IN THE

Supreme Court of the United States

October Term, 1971

No.....

MICHAEL BENSON, JUNE TRACY, EDDIE BROWN and LINDA HUBBARD, *Petitioners,*

v.

JOSEPH RICH, JACK JOHNSON, CHRIS DiGREGORIO, EDWARD S. ("IKE") MERRY, and RICHARD KAUZLARIC, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Dated: January, 1972

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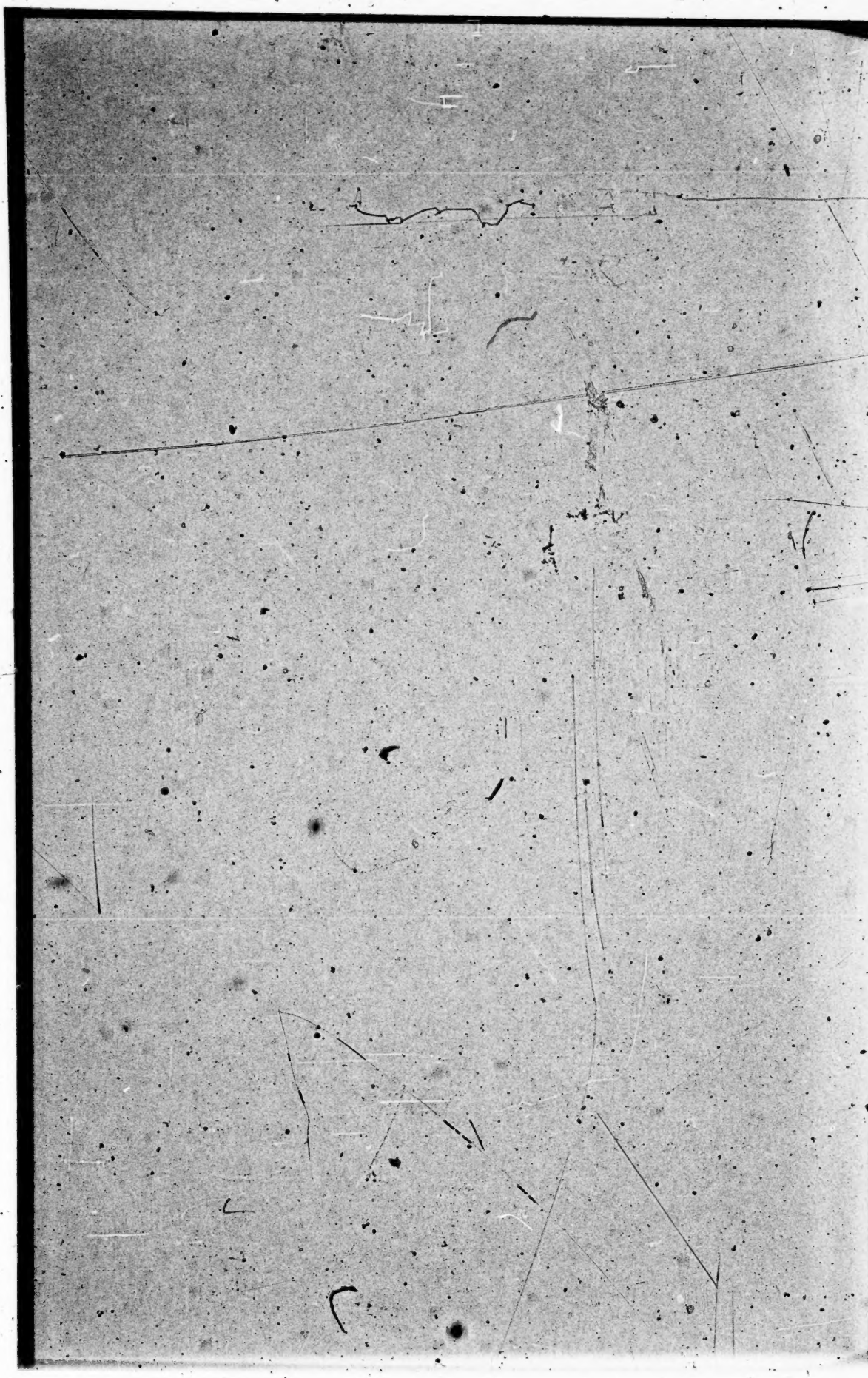

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THE OPINIONS BELOW

The judgment and supporting findings of fact and conclusions of law of the District Court granting defendant Joseph L. Rich's motion for summary judgment is unreported and set out in Appendix A. The judgment and supporting findings of fact and conclusions of law of the District Court dismissing the complaint and the cause is unreported and set out in Appendix B. The opinion of the United States Court of Appeals for the Tenth Circuit affirming the lower court's judgments is reported at 448 F.2d 1371 and is set out in Appendix C.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment of the United States Court of Appeals for the Tenth Circuit affirming the district court's judgments was entered on October 18, 1971. No rehearing petition as filed.

(ii) Jurisdiction of the petition is conferred on this Court by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a prosecuting attorney has immunity from a claim for damages arising under 42 U.S.C. §1983?

2. Whether the mere possibility of disorder at a public gathering constitutes such a clear and present danger as to justify public officials suppressing the exercise of First Amendment freedoms?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983 of Title 42, United States Code, provides as follows:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. § 1979.)

DERIVATION

Act Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.
9 U.S.C. 10283 (1970 ed.).

STATEMENT OF THE CASE

The Inter-Tribal Indian Ceremonial is an annual affair in Gallup, New Mexico, put on in mid-August by the Inter-Tribal Indian Ceremonial Association, an agency of the State of New Mexico. N.M. Stat. Ann §73-31-1 *et seq.* (1953 Comp.). During the 1969 Ceremonial, on August 15, petitioners Michael Benson and Eddie Brown, both young Indians, went to the Ceremonial grounds in order to pass out leaflets entitled "When Our Grandfathers Carried Guns." The text of the leaflet is set out at Appendix D. The leaflet was harshly critical of the Ceremonial and the City of Gallup. While petitioners were passing out the leaflet in front of the main grandstand, petitioner Benson was accosted by respondent DiGregorio, the grandstand supervisor. Mr. DiGregorio took the leaflets from Mr. Benson and advised respondent Kauzlaric, then President of the Association, of Mr. Benson's activities. They then confronted Mr. Benson and asked his name, which Mr. Benson said he would only give a police officer. Standing nearby was respondent Johnson, a New Mexico State Police Officer who

was called over and obtained Mr. Benson's name. After some discussion, Mr. Benson stated that he would not further distribute leaflets on Ceremonial grounds. Shortly after this Mr. Benson met with Mr. Brown and some other young people and related to them what had happened. At one point, Mr. Johnson heard one of the group say that if Benson wanted them to they would tear the Ceremonial down. However, neither Mr. Benson nor Mr. Brown heard such a statement and they characterized the group as very peaceful. Shortly thereafter petitioners left the grounds.

Petitioners conferred with an attorney, who informed them they had a right to distribute leaflets on the Ceremonial grounds. On the following morning petitioners handed out the leaflets along the Gallup streets, which were in a crowded condition because of the Ceremonial parade. When petitioners proceeded to the Ceremonial grounds and began distributing the leaflets there, they were again accosted by despondent Johnson, who informed them that they could be arrested for trespass if they remained on the grounds distributing the leaflets. Mr. Benson stated that he had a legal right to remain there and hand out leaflets, and asked to be taken to the District Attorney. Mr. Johnson and Mr. Benson then met with respondents Kauzlaric and Rich in a small room underneath the grandstands. Mr. Rich, who was and is the Assistant District Attorney for the Eleventh Judicial District of New Mexico, had prior thereto informed Mr. Kauzlaric that the Ceremonial grounds were private property and subject to the exclusive control of the Association. He further interpreted the leaflet as a call to arms and opined that it could spark a riot. Mr. Kauzlaric revoked Mr. Benson's privilege to be on the grounds while distributing the leaflets and Mr. Rich informed Mr. Benson that he could be arrested for criminal trespass if he remained on the grounds passing out the leaflets. Respondents also informed

Mr. Benson that he was perfectly free to distribute the leaflet on the Gallup city streets. Petitioner Benson, accompanied by respondent Johnson, then rejoined the other petitioners and told them what had happened. Closely followed by Mr. Johnson, petitioners left the grounds.

Petitioners filed their complaint for money damages and injunctive relief on September 19, 1969, alleging deprivation of civil rights. An amended complaint for damages, declaratory and injuctive relief was filed on November 9, 1969. The bases for jurisdiction in the district court were 42 U.S.C. §§1981, 1983 and 1985; 28 U.S.C. §§1343, 2201, 2202 and 1651. On July 16, 1970, the district court entered summary judgment in favor of respondent Rich. See Appendix A. After a non-jury trial on the merits, the district court entered a judgment of dismissal on August 7, 1970. See Appendix B. Petitioners noticed appeals to the United States Court of Appeals for the Tenth Circuit from the judgment of dismissal on August 7, 1970, and the summary judgment on August 11, 1970. The appeals were docketed as Nos. 519-70 and 520-70 and consolidated. After extensive briefs were filed and oral argument heard, the United States Court of Appeals for the Tenth Circuit affirmed the lower court's judgments on October 18, 1971. 448 F.2d 1371. See Appendix C.

REASONS FOR THE ALLOWANCE OF THE WRIT

A. PROSECUTING ATTORNEY IS LIABLE FOR DEPRIVATION OF CIVIL RIGHTS

In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court held that state court judges are immune from 42 U.S.C. §1983 damage actions, although state court judges are subject to federal criminal liability for violation of federal civil rights. *Ex Parte Virginia*, 100 U.S. 339 (1879). Relying upon *Ya-*

selli v. Goff, 12 F.2d 396 (2d Cir. 1926) *aff'd per curiam* 275 U.S. 503 (1927), some courts have held that a prosecuting attorney is also shielded from §1983 liability by quasi-judicial immunity. E.g., *Fanale v. Sheehy*, 385 F.2d 866 (2d Cir. 1967); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) *cert. denied* 386 U.S. 1021 (1967); *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965) *cert. denied* 383 U.S. 913 (1966); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961) *cert. denied* 369 U.S. 868 (1962); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) *cert. denied* 339 U.S. 949 (1950).

Other circuits have held that a prosecuting attorney does not have a blanket immunity from a claim under Civil Rights Act, and have examined the prosecutor's role in the situation in question. In *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965), the court said:

> We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity — integral relationship between his acts and the judcial process — ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? See Monroe v. Pape, supra, 365 U.S. at 187, 81 S.Ct. 473; see also Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182, L.R.A. 1916F, 399 (1916), cited in Yaselli, 12 F.2d at 405. To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

The prosecuting attorney may have numerous rules. See Barrett, Police Practices and the Law — From Ar-

> rest to Charge, 50 Calif. L. Rev. 11, 16-24 (1962). The distinction between the roles may be significantly controlling, for, as our court quite recently emphasized, "prosecutors are not immune from suit under the Act simply as a matter of status wholly without regard to the nature of their conduct." Corsican Productions v. Pitchess, 338 F.2d 441 (9th Cir. 1964).

351 F.2d at 536-537 (footnote omitted). Accord: *Madison v. Purdy*, 410 F.2d 99 (5th Cir. 1969); *Corsican Productions v. Pitchess*, 338 F.2d 441 (9th Cir. 1964); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); *Rousselle v. Perez*, 293 F.Supp.298 (E.D. La. 1968); *Friedman v. Younger*, 282 F.Supp.710 (C.D. Cal. 1968); *Link v. Greyhound Corp.*, 288 F.Supp.898 (E.D. Mich. 1968); *DeLatte v. Genovese*, 273 F.Supp.654 (E.D. La. 1967).

The decisions in favor of blanket quasi-judicial immunity for prosecutors are couched in general, all-embracing terms and do not admit exceptions to the rule. Thus, in *Bauers v. Heisel, supra* at 589, the court concludes that "both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary." There is no analytical distinction made between a prosecutor's judicial duties and his investigatory ones in these cases.

There is a clear conflict among the circuits on the question: the Fifth *(Lewis v. Brautigam, supra)* and the Ninth *(Robichaud v. Ronan, supra)* making an initial analytical determination of the prosecutor's role in the conduct at issue, and the Second *(Fanale v. Sheehy, supra)*, Third *(Bauers v. Heisel, supra)*, Sixth (*Gabbard v. Rose*, 359 F.2d 182 (6th Cir. 1966)), Seventh (*Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959)) and Tenth Circuits *(Kostal v. Stoner, supra)* affording blanket immunity. Because of the

conflict among the circuits on this question, and since the Court has not yet taken a position on the question, the writ should be granted. *Bingler v. Johnson*, 394 U.S. 741 (1969); *United States v. Muniz*, 374 U.S. 150 (1963).

Moreover, the question of prosecutorial immunity is "an important question of federal law which has not been, but should be, settled by this Court* * *." Rule 19 (1) (b) of the Supreme Court of the United States; *Yellin v. United States*, 374 U.S. 109 (1963). The scope of §1983 as applied to state prosecutors and other similarly situated officials should be determined. Petitioners take the position that the better rule is expressed by the Ninth Circuit in *Robichaud*, although a good argument can be made for no prosecutorial immunity at all. A study of the legislative history of §1983 shows conclusively that the proponents of the original 1871 statute intended to make *judges* liable for any depredations committed upon a citizen's civil rights. See the remarks of Congressman Samuel Shellabarger in Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871), analogizing the proposed statute with its model, the Civil Rights Act of 1866, now 18 U.S.C. §242. See also the remarks of Congressman Coburn, Cong. Globe, 42nd Cong., 1st Sess. App. 461 (1871). Cf. *Monroe v. Pape* 365 U.S. 167, 185-186 (1961); Kates, *Immunity of Judges Under the Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U. L. Rev. 615, 621-623 nn. 23-31 (1970); Comment, *Liability of Judicial Officers under Section 1983*, 79 Yale L.J. 322 (1969). *A fortiori*, prosecutors should also be liable under § 1983.

It is submitted that respondent Rich deprived petitioners of rights guaranteed them by the Fourteenth Amendment and that such deprivation was accomplished under color of state law. This is sufficient liability under *Monroe v. Pape*.

365 U.S. 167, 171 (1961). The decision of the Court of Appeals is in conflict with this Court's holding in *Monroe* and should be reversed.

B. DECISION OF THE COURT OF APPEALS CONFLICTS WITH RECENT DECISIONS OF THIS COURT UPHOLDING FREE EXERCISE OF EXPRESSION

The Court of Appeals apparently conceded that petitioners were engaged in the peaceful exercise of First Amendment rights and that their initial presence on the Ceremonial grounds was lawful. *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946). But the Court premised its holding against petitioners upon two facts: (1) the leaflet in question was a "call to arms" to the Indians and it was therefore "necessary that the distribution be halted to prevent *possible* disorders or riots on the grounds", 448 F.2d at 1373 (emphasis supplied) and (2) respondent Johnson's uncorroborated statement that he had heard someone tell petitioner Benson that if Benson so demanded the group would tear apart or burn down the facilities. *Id.* These two facts supposedly warranted the finding of a clear and present danger which justified respondents' actions in denying petitioners the right of distributing the leaflets.

With respect to fact (1), a reading of Appendix D shows that the leaflet is not a "call to arms." It does not invoke violence or seek to incite anyone to commit unlawful acts. While it is a strongly-worded document, it cannot under any circumstances be considered a clear and present danger of a riot. There is no advocacy of riot or even of disruption in the leaflet. This Court invalidated, as an unlawful abridgment of free speech, a Chicago ordinance which permitted punishment for breach of the peace for speech which "stirs

the public to anger, invites disputes [or] brings about a condition of unrest* * *." *Terminiello v. Chicago*, 337 U.S. 1, 3-4 (1949). Even though a riot had actually occurred and the speech in question had provoked a hostile mob, incited a friendly one, and threatened violence between the two, the Court found that there was no "clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Id.* at 4. In this case, respondent Rich did not make any personal investigation of the situation, nor did he delegate any law enforcement officer to look into the matter. By an off-hand judgment, untouched by any factual investigation, respondent Rich concluded that the leaflet was tinder in an inflammatory situation. Not only does the leaflet not justify this conclusion in the context of this Court's decisions construing "clear and present danger" (see, e.g., *Cantwell v Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 301 U.S. 242 (1937)), but it is clear that the mere "possibility" of rioting does not permit the suppression of free speech. Comparing this case with *Feiner v. New York*, 340 U.S. 315 (1951), it is evident that the latter shows a true situation of clear and present danger: a speaker addressing a crowd including Negroes and urging the Negroes to rise up in arms and fight for their rights.

With respect to the second fact, it rests upon an uncorroborated statement overheard by respondent Johnson. No one else heard the statement. There is no dispute that the group out of which this alleged utterance issued was peaceful, and left the Ceremonial grounds a short time thereafter. Clearly an uncorroborated statement heard by only one witness, himself an adverse party, should not be used to deny First Amendment rights.

Less than seven months ago, this Court stated:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); see also Near v. Minnesota, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

New York Times Co. v. United States, 403 U.S. 713, 714 (1971). The governmental authorities in this case have not met that burden. In a number of recent cases, this Court has sustained the right of free expression in situations where the utterances could be considered scurrilous, insulting or outrageous. In this category is *Cohen v. California*, 403 U.S. 15 (1971) which reversed the disturbing the peace conviction of a person wearing a jacket stencilled with the words "Fuck the Draft" in the Los Angeles County Court House on First Amendment grounds. Acknowledging the distasteful way in which Cohen expressed his opposition to the Vietnam War, the Court found that the message on Cohen's jacket would not incite anyone to violence, despite the lower court's apprehensions on that score. Similarly, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court dissolved an injunction against the leafletting of a real estate broker for the latter's alleged discriminatory practices in selling real estate. The leaflets were distributed at a shopping center, on the broker's neighbors' doorsteps, and to the broker's church parishioners. Even conceding *arguendo* the lower court's opinion that the purpose of the leaflet distribution was to coerce the realtor into dropping his alleged practices, the Court found that "[t]he claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." 402 U.S. at 419. The constitutional pro-

tection for the advocacy of unpopular ideas was also vindicated in *Bachellar v. Maryland*, 397 U.S. 564 (1970), where a disorderly conduct conviction was reversed because of a jury instruction stating that a guilty verdict might be returned if the defendant's conduct offends, disturbs, incites or tends to incite a number of people in the same area. Similarly, in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), an *ex parte* injunction barring a rally of the white supremacist National State Rights Party was vacated. Even though the officials concerned argued strenuously that the injunctive order was necessary because of the clear and present danger of a riot deliberately generated by the petitioners' speeches and exhortations, the Court found that the *ex parte* injunction was little removed from self-help by the police. Yet it is such self-help that was approved by the lower court of appeals in the instant case. And the court relied exclusively on the respondents' version of the facts in its opinion, despite their special interest in the case. *Carroll v. President and Commisioners of Princess Anne*, *supra* at 183 n.10.

The decision of the Court of Appeals is directly contrary to and in conflict with the holdings of this Court in the *New York Times Co.*, *Cohen*, *Keefe*, *Bachellar* and *Carroll* cases and certiorari should issue in order to correct the Court of Appeal's misreading of these cases. See *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961). The fact that the Court of Appeals relied upon the district court's finding of fact does not insulate it from review since the "decision here for review cannot escape broadly social judgments — judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship. Deference properly due to the finding of a lower court does not preclude the review here of such judgments." *Baumgartner*

v. United States, 322 U.S. 665, 671 (1944). And this Court will review findings of fact where conclusions of law as to a federal right and a finding of fact are so intertwined as to make it necessary to analyze the facts in order to pass upon the federal question. *New York Times Co. v. Sullivan*, 376 U.S. 254, 284 n.26 (1964).

CONCLUSION

Petitioners ask that this Court grant the writ, reverse the Court of Appeals and remand the case to the district court in order to determine the measure of damages due petitioners from respondents.

Respectfully submitted,

DONALD JUNEAU
Attorney for Petitioners

Dated: January 13, 1972

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 8215

MICHAEL BENSON, LINDA HUBBARD and JUNE TRACY, for themselves and on behalf of a class of persons similarly situated,

Plaintiffs,

vs.

JOSEPH L. RICH, EDWARD S. MERRY, JACK JOHNSON, CHRIS DiGREGORIO, RICHARD KAUZLARIC, and the INTER-TRIBAL INDIAN CEREMONIAL ASSOCIATION, a corporation,

Defendants.

No. 8215
FILED
AT SANTA FE
JULY 16, 1970
E. E. GREESON
CLERK

SUMMARY JUDGMENT

This cause came on to be heard upon the Motion for Summary Judgment of the Defendant, Joseph L. Rich, the Court having heard in full and considered arguments of counsel thereon and having examined the pleadings and depositions on file herein and having concluded that Defendant, Joseph L. Rich, is immune from suit in this action as a matter of law, and having made and filed herein Findings of Fact and Conclusions of Law, and being otherwise fully advised in the premises, having granted said Motion, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Complaint and each and every cause of action or

count therein contained be, and it hereby is, dismissed with prejudice against the Defendant, Joseph L. Rich.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, Joseph L. Rich, and the Plaintiffs shall each bear their own costs.

Dated this 16th day of July, 1970.

EWING T. KERR
United States District Judge, Assigned

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 8215 Civil

MICHAEL BENSON, LINDA HUBBARD, JUNE TRACY and EDDIE BROWN, for themselves and on behalf of a Class of Persons similarly situated,

Plaintiffs,

vs.

JOSEPH L. RICH, EDWARD S. (IKE) MERRY, JACK JOHNSON, CHRIS DiGREGORIO, RICHARD KAUZLARIC and THE INTER-TRIBAL INDIAN CEREMONIAL ASSOCIATION, a Corporation,

Defendants.

Original Filed
at Santa Fe
July 16, 1970
E. E. Greeson
Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for hearing upon the motion heretofore filed by the defendant Joseph L. Rich for a Summary Judgment, the Court having heard the arguments of counsel, having examined the pleadings and depositions on file herein, and being otherwise fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This Court has jurisdiction over the subject matters involved herein.

2. The defendant Joseph L. Rich was, at all material

times, the Assistant District Attorney for McKinley County, New Mexico.

3. On Saturday, August 16, 1969, while the defendant Rich was in a small room beneath the grandstand on the Ceremonial Grounds in Gallup, New Mexico, working as a member of a volunteer committee for the Ceremonial, he was handed a copy of the leaflet plaintiffs had been distributing and was advised that there had been a disturbance Friday night by persons blocking the exit to the grandstand area.

4. The defendant Rich read the leaflet and concluded, in good faith, that the language thereof presented a clear and imminent danger of creating or inciting a riot situation among the approximately eight thousand persons who were expected to attend each performance at the Ceremonial that day.

5. Shortly thereafter the defendant Richard Kauzlaric, the President of the defendant Inter-Tribal Indian Ceremonial Association, an official agency of the State of New Mexico, approached the defendant Rich in his capacity as Assistant District Attorney, indicated that he was concerned about another disturbance at the Ceremonial that day, and asked the defendant Rich for his advice as to what could be done to prevent such a disturbance.

6. The principal concern of the defendant Rich was to prevent a riot situation from developing, and he asked the defendant Kauzlaric if the Ceremonial Association owned the Grounds.

7. The defendant Kauzlaric replied that the Ceremonial Association did own the property, and the defendant Rich advised Kauzlaric that he, as President of the Association, could withdraw his consent for the person distributing the leaflets to remain on the premises.

8. The defendant Rich believed, in good faith, that the Ceremonial Grounds were private property, that the language of the leaflet presented a clear and present danger of creating a riot situation, that the distribution of the leaflets on the Ceremonial Grounds could lawfully be prevented, and if consent to remain upon the Grounds were revoked or withdrawn and the plaintiffs refused to leave they would be in violation of the New Mexico Criminal Trespass Laws.

9. Some time thereafter the defendant Kauzlaric withdrew his consent for the plaintiffs to remain on the premises.

10. Subsequently, the defendant Jack Johnson, a uniformed member of the New Mexico State Police Department, appeared in the room mentioned above with the plaintiff Michael Benson and approached the defendant Rich in his capacity as Assistant District Attorney.

11. The defendant Johnson introduced the defendant Rich to the plaintiff Benson as the District Attorney or the Assistant District Attorney and requested the defendant Rich to advise the plaintiff Benson as to what his situation was.

12. The defendant Rich advised the plaintiff Benson that the Ceremonial Officials did not like what he was doing with passing out the leaflets, that the Ceremonial Grounds were private property, that permission for him to remain on the premises had been withdrawn, and that he would be arrested if he did not leave the premises or stop distributing the leaflets on the premises.

13. The defendant Rich then explained to the plaintiff Benson that the plaintiffs could distribute the leaflets on the streets of Gallup.

14. The plaintiff Benson made no reply and he and the defendant Johnson then left the room.

15. The defendant Johnson, acting upon the advice of the defendant Rich, and having been advised by the defendant Kauzlaric that he, as an officer of the Inter-Tribal Indian Ceremonial Association, was withdrawing the association's permission for the plaintiffs Benson, Hubbard and Tracy to remain on the association's grounds, accompanied said plaintiffs off the grounds.

16. At no time were the plaintiffs arrested.

17. At all material times the defendant Rich was acting in his capacity as Assistant District Attorney for McKinley County, New Mexico, in the performance of the duties of his office, and concerning matters within his jurisdiction.

18. Any facts disclosed by any of the deposition testimony which may be, or appear to be, in conflict with the foregoing are not material to the issues involved herein.

CONCLUSIONS OF LAW

1. The defendant Rich, as Assistant District Attorney, was a judicial or quasi-judicial officer enjoying immunity from civil liability for acts performed in his judicial or quasi-judicial capacity and in the performance of the duties of his office so long as he did not act without or in excess of his jurisdiction.

2. Included within the jurisdiction and duties of the office of Assistant District Attorney for McKinley County, New Mexico, were the duties of advising all county and state officers whenever requested, taking necessary steps to prevent the occurrence of violence, deciding, based upon the facts submitted to him and upon the request of a New Mexico State Police Officer, whether an act has violated or will violate State Law, advising a private citizen upon request that his acts have violated or will violate the State

Law, and taking necessary steps to prevent the violation of State Law.

3. The defendants Kauzlaric and Johnson were State Officers within the meaning of the above duties.

4. The defendant Rich, at all material times, was acting in his judicial or quasi-judicial capacity, in the performance of his duties concerning matters within his jurisdiction and is immune from civil liability in this cause.

Dated this 16th day of July, 1970.

EWING T. KERR
United States District Judge,
Assigned

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 8215 Civil

MICHAEL BENSON, LINDA HUBBARD, JUNE TRACY and EDDIE BROWN,

Plaintiffs,

vs.

THE INTER-TRIBAL INDIAN CEREMONIAL ASSOCIATION, EDWARD S. (IKE) MERRY, JACK JOHNSON, CHRIS DiGREGORIO and RICHARD KAUZLARIC,

Defendants.

JUDGMENT OF DISMISSAL

The above entitled matter having come on regularly for hearing before the Court, sitting without a jury, and at the conclusion of said trial the Court took said matter under advisement, and having considered the evidence, the exhibits, the pleadings, the memorandum submitted by plaintiffs and the authorities submitted by the defendants, and having prepared and filed herein its Finding of Fact and Conclusions of Law finding generally for the defendants and against the plaintiffs, now, therefore, it is

ORDERED that the complaint, together with the cause, be, and the same is hereby dismissed.

IT IS FURTHER ORDERED that defendants have their cost herein expended, to be taxed by the Clerk.

Dated this 7th day of August, 1970.

EWING T. KERR
Judge, United States District Court,
Assigned

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 8215 Civil

MICHAEL BENSON, LINDA HUBBARD, JUNE TRACY and EDDIE BROWN,

Plaintiffs,

vs.

THE INTER-TRIBAL INDIAN CEREMONIAL ASSOCIATION, EDWARD S. (IKE) MERRY, JACK JOHNSON, CHRIS DiGREGORIO and RICHARD KAUZLARIC,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on regularly for hearing before the Court, sitting without a jury, the plaintiffs appearing by and through their counsel, Theodore R. Mitchell and Robert C. Hanna, and the defendant the Inter-Tribal Indian Ceremonial Association, Edward S. (Ike) Merry, Chris DiGregorio and Richard Kauzlaric appearing by and through their counsel Harl D. Byrd of the firm of Bigbee & Byrd, and the defendant Jack Johnson appearing by and through his counsel Robert G. McCorkle of the firm of Rodey, Dickason, Sloan, Akin & Robb and Miss Joyce Blalock, Assistant Attorney General for the State of New Mexico, and the Court having heard the testimony offered for and on behalf of the plaintiffs and the evidence adduced for and on behalf of the defendants, took said matter under advisement. The Court now having considered the pleadings, the testimony and exhibits, together with the memorandum submitted by plaintiffs and the authorities submitted by the defendants, and being fully advised in the prem-

ises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the Inter-Tribal Indian Ceremonial Association is and has been a nonprofit corporation organized under and by virtue of the laws of the State of New Mexico and is hereinafter referred to as "Association".

2. In 1939 the Association was designated by the State of New Mexico pursuant to Section 73-31-1, New Mexico Statutes Annotated, 1953 Compilation, as amended, and is an official agency of the State of New Mexico for the purpose of encouraging the preservation and development of Indian Arts and Crafts among Indian tribes and pueblos of the State of New Mexico; encouraging the preservation of traditional rites and ceremonials of the Indian tribes and pueblos; and for the development of knowledge and appreciation of Indian arts, crafts, rites and ceremonials among other people.

3. The Association owns real property with the improvements thereon, commonly called Lyon Memorial Park located in McKinley County, New Mexico, near the city of Gallup, State of New Mexico.

4. The Articles of Incorporation which were in effect at the time this controversy arose are as follows:

"(a) The provision of facilities for the operation and conduct of the Inter-Tribal Indian Ceremonial; the exhibition of agricultural and husbandry products produced by the American Indians; display and exhibition of Indian blankets, pottery, baskets, silverware, jewelry, furniture and other articles made by Indians; the exhibition of all handwork, writings, paintings, etc., of

Indian school children; in fact the exhibition of any product made, produced or raised by the American Indian which will further their education or the education of others interested.

(b) For provision of facilities for the various Indian Tribes to exhibit or perform their various tribal or individual dances, religious ceremonies, songs and sports or any other performance or exhibition that may tend to educate the Indians themselves or others interested in Indian Folklore, history or religion".

5. The By-Laws of the Association which were in effect at all material times hereto provide in part that:

"1. The management of this Association shall vest in a BOARD OF DIRECTORS consisting of Twelve (12) members.

5. Memberships in this Association may be held by any person, firm or corporation and shall not be listed in the number held by any such person, firm or corporation. The membership fee shall be Ten ($10.00) Dollars and shall be paid at the time of making application for membership. A membership in this Association shall be for One (1) year only, but may be renewed from year to year upon the payment of the membership fee.

6. Each membership shall entitle the holder thereof to One (1) vote at all meetings of the Association.

9. The Financial Support of this Association shall be derived from Membership Fees, Gifts, Donations and monies received from the exhibits at the Ceremonial. The monies so received by this Association shall be used only for the following purposes:

(a) The provision of facilities for the operation

and conduct of the Inter-Tribal Indian Ceremonial; the exhibition of Agricultural and Husbandry products produced by the American Indians; display and exhibition of Indian blankets, pottery, baskets, silverware, jewelry, furniture and other articles made by Indians; the exhibition of all handwork, writings, paintings, etc., of Indian school children; in fact, the exhibition of any product made, produced or raised by the American Indian which will further their education or the education of others interested.

(b) For provision of facilities for the various Indian Tribes to exhibit or perform their various tribal or individual dances, religious ceremonies, songs and sports or any other performances or exhibitions that may tend to educate the Indians themselves or others interested in Indian folklore, history or religion".

6. That defendant Richard Kauzlaric was President of the Association, defendant Edward S. Merry was employed by the Association as Executive Director, and defendant Chris DiGregorio was employed as Grandstand Supervisor.

7. That the defendant Jack Johnson was acting in the course and scope of his employment and duties as a New Mexico State Police Officer and was on assignment at the Inter-Tribal Indian Ceremonial at Gallup, New Mexico.

8. At no time herein did the Association, Kauzlaric, DiGregorio or Merry ever have any direct or indirect contact with any of the plaintiffs Brown, Hubbard or Tracy.

9. That at no time herein did the defendant Merry ever have any direct or indirect contact with any of the plaintiffs, Benson, Brown, Hubbard or Tracy.

10. The 1969 Association ceremonial was held on August 14th through 17th, 1969, on its property described in Finding of Fact number 3. There were afternoon and evening performances presented to persons occupying a grandstand and bleachers. The Association grounds are fenced and automobiles entering the grounds are charged a parking fee while pedestrians are admitted to the Association grounds without charge and also charges are made for admission to the grandstand and bleachers for the performances.

11. That the main entrance and exit of the grandstand is located in the center of the structure which exits into a restricted area called the concourse and in which concourse area there are several refreshment stands. The concourse area, prior to, during intermissions and after the various performances, is a highly congested area with persons entering and leaving the grandstand, purchasing refreshments, which area is kept free from obstructions so that an orderly flow of persons may be maintained. During performances there are still many hundreds of people in the concourse area with thousands of others on the ceremonial grounds viewing the exhibits or in the process of coming from and going to the various activities held on the ceremonial grounds.

12. During the ceremonial most ceremonial officials and employees wear bright colored velveteen shirts and pants and defendants Kauzlaric and DiGregorio were wearing the same during these performances.

13. The grandstand and bleachers were substantially occupied by spectators during the evening performance of Friday, August 15, 1969.

14. That during the evening of August 15, 1969, a lady showed plaintiffs' Exhibit No. 1 to Kauzlaric and asked him

where she could obtain another copy, which was the first knowledge Kauzlaric had of plaintiffs' Exhibit No. 1.

15. That at approximately 10:00 P.M. on Friday, defendant Johnson observed plaintiff Michael Benson handing out leaflets Plaintiffs' Exhibit No. 1, while Benson was standing very near the exit aisle of the main entrance of the grandstand on the Ceremonial grounds during intermission and observed that Benson, in such a position, was obstructing the orderly flow of the pedestrian traffic. Johnson approached Benson and was handed a leaflet and then stepped back away from the flow of traffic, and moved several feet from Benson and read the first two or three paragraphs of the leaflet.

16. That at the August 15, 1969, evening performance, at or about 10:00 o'clock P.M., DiGregorio, grandstand supervisor, observed Benson standing in or near the exit aisle of the main entrance of the grandstand in such a manner that he was blocking or disturbing the orderly flow of the spectators exiting from the grandstand while passing out copies of plaintiffs' Exhibit "1" into the arms of spectators passing by him DiGregorio approached Benson and asked him what he was doing and Benson replied to the effect it was none of DiGregorio's business whereupon DiGregorio reached for a leaflet and whereupon Benson lowered the leaflets he was holding and gave all of them to DiGregorio and moved away from the exit.

17. That shortly after Benson gave his leaflets to DiGregorio, Kauzlaric approached Benson, introduced himself and asked Benson for his name, to which request Benson refused stating Kauzlaric was not a police officer, but Benson intimated he would give his name to a police officer, whereupon Kauzlaric and Benson walked over to where defendant Johnson was standing, at which time defendant Kau-

zlaric introduced himself to defendant Johnson, stating that he was President of the Ceremonial Association and that Benson had refused to identify himself to Kauzlaric as Kauzlaric was not a police officer. Kauzlaric asked Johnson to obtain Benson's name.

18. That defendant Johnson introduced himself to Benson and asked Benson for identification. Benson did not object to identifying himself to Johnson and gave him [sic] name and address to him. He asked Johnson if it was necessary to give the information Kauzlaric.

19. That Johnson stated that in his opinion the information was public record and that he felt Kauzlaric could obtain the information by asking for it and Johnson then repeated Benson's name and address to Kauzlaric. That Kauzlaric was standing close enough to Benson and Johnson to hear the conversation between them.

20. That during the aforesaid discussion on Friday evening of August 15, 1969, Kauzlaric gave Benson Kauzlaric's business card and stated that if Benson had anything he would like to discuss about the Ceremonial or any other problem that Kauzlaric would like to discuss it with Benson at that time or any other time Benson might desire and it was agreed between Benson and Kauzlaric that Benson would not further distribute the leaflets on the ceremonial grounds.

21. That after the aforesaid discussion, Benson met or was joined by a group of young people who all engaged in a discussion about the leaflet. Benson told the group "That cop took away my leaflets". One of the persons in the goup stated that if Benson wanted, the group would tear apart or burn the Ceremonial facility down. Officer Johnson observed this discussion and heard these statements.

22. That Benson departed from the group and ran to the parking lot where he got in Brown's car. As the car started to move from its parking place, Officer Johnson walked by and Michael Benson bent over or crouched down in the car in an attempt to hide from Johnson. Johnson saw Benson trying to hide and stopped the car.

23. That Johnson asked Brown for his driver's license and for the registration papers on the car. After Brown produced these items the three engaged in a discussion which lasted between five to fifteen minutes. Johnson did not threaten either Benson or Brown with arrest and did not tell them that they had to leave the Ceremonial grounds and believed that Benson had agreed not to further distribute the leaflets on the Ceremonial grounds. Johnson was courteous with the plaintiffs and they were courteous towards Johnson. The conversation included social matters, including the attendance of Mr. Brown and defendant Johnson's daughter at Eastern New Mexico University. The conversation ended on a friendly note and Officer Johnson shook hands with both plaintiffs.

24. That Johnson was specifically authorized by N.M.S.A. §65-3-11 (1953 Comp.) and N.M.S.A. §64-13-49 (1953 Comp.) to obtain Brown's driver's license and automobile registration.

25. That Johnson did not see Brown at any place on the Ceremonial grounds until the conversation which occurred in Brown's car at the parking lot.

26. That the plaintiffs then departed from the Ceremonial grounds.

27. That later that evening Johnson met his grounds supervisor, Sergeant Shockey, and told Shockey that plaintiffs had agreed not to disribute the leaflets on the Ceremonial grounds.

28. That during the forenoon of August 16, 1969, Johnson told Kauzlaric about overhearing the remark about tearing or burning the place down on Friday evening and Benson's rushing off the grounds.

29. That at approximately 12:30 on the following day, Saturday, August 16, 1969, the plaintiffs Benson, Tracy and Hubbard came to the Ceremonial grounds and started handing out copies of the leaflets.

30. That Kauzlaric, after again observing Benson passing out leaflets on August 16, 1969, discussed with the Assistant District Attorney and District Attorney for McKinley County, who were on the Ceremonial grounds, the contents of the leaflet; the impact the leaflet could have upon the thousands of people, including many of Indian descent, arriving for the afternoon performance; the disturbances at the main entrance to the grandstand by Benson on Friday evening; the remark about tearing or burning the place down as told to Kauzlaric by Johnson; and told the District Attorney and the Assistant District Attorney about his concern that the continued handing out of the leaflet on the Ceremonial grounds might cause a substantial disruption or material interference with the ceremonial activities and sought their advice in their official capacities as District Attorney and Assistant District Attorney for McKinley County, New Mexico, as to what could be done about preventing possible disturbances or disorders.

31. That the Assistant District Attorney interpreted the contents of the leaflet to amount to a call to arms and under the circumstances and the impact which the leaflet could have upon the thousands of people, including many of Indian descent, arriving for the afternoon performance on August 16, 1969, and the events of August 15, 1969, the Assistant District Attorney believed that a substantial disruptive

material interference could develop and lead to a riot situation and upon being informed by the District Attorney that the Ceremonial grounds were private property advised Kauzlaric that he, as President of the Association, could withdraw Benson's permission to be on the Ceremonial grounds if he continued to pass out the leaflets and if Benson continued to do so then a criminal complaint could be made by the Association and Benson could be arrested for criminal trespass. Based upon this advice Kauzlaric informed Johnson that Kauzlaric, as President of the Association, was denying Benson's permission to be on the grounds if he continued to pass out the leaflets.

32. That Johnson stated he must check with his supervisors, contacted his supervisors, Captain Cordova, and received instructions from Cordova to check with the District Attorney and follow his advice.

33. That Johnson located Assistant District Attorney Joseph Rich. Rich told Johnson that Kauzlaric, as President of the Ceremonial Association, had authority to and had withdrawn the consent of the Ceremonial Association for the plaintiff Benson to remain on the Ceremonial grounds handing out the leaflets.

34. That Johnson located Benson and stated that he had been instructed by the District Attorney to tell him to stop handing out the leaflets and that the District Attorney had stated that Benson could be arrested if he continued to hand out the leaflets on the grounds.

35. That Benson asked for an opportunity to discuss the matter with the District Attorney. Johnson took Benson and introduced Rich to Benson as the District Attorney and stated that Benson would like to know what his situation was. Rich advised Benson that the Ceremonial grounds was private property, that permission for him to remain on the

premises had been withdrawn, and that if Benson did not stop distributing the leaflets on the premises a criminal complaint in trespass could be filed against him. Benson, following these statements, made no oral reply but manifested his agreement that he would stop passing out leaflets on the Ceremonial grounds.

36. That Rich told Benson he could distribute the leaflets off of the Ceremonial grounds. Johnson asked Benson if he had any questions or if he understood the situation to which Benson made no reply. Benson and Johnson left the room and Benson joined the plaintiffs Tracy and Hubbard, who were on the Ceremonial grounds handing out leaflets.

37. That Benson told Tracy and Hubbard what the District Attorney had told him and Benson told Tracy and Hubbard that they should leave the grounds to distribute their leaflets.

38. That Officer Johnson told Benson, Tracy and Hubbard they were welcome to remain on the grounds if they would not hand out leaflets or that they could hand out the leaflets outside the grounds to people coming onto the grounds.

39. That Johnson said Benson could inform other persons handing out the leaflets on the grounds of the position taken by the District Attorney and that no one would be arrested until they had been warned to stop handing out the leaflets on the grounds and an opportunity afforded to discuss the matter with the District Attorney if they so desired.

40. That Miss Hubbard was joined by a friend, Kathy Marmon, and started to hand Miss Marmon a leaflet when Officer Johnson lowered his arm to prevent her from handing Miss Marmon the leafet. Officer Johnson stated "Let's go" and followed behind Tracy, Hubbard, Benson and Mar-

mon at a distance of approximately fifteen feet as they exited from the Ceremonial grounds. Johnson kept a sufficient distance between himself and the plaintiffs so that it would not appear to anyone who saw the plaintiffs leaving the grounds that they were being escorted by a police officer.

41. Officer Johnson's primary responsibility on Saturday afternoon was to guard the funds in the ticket office near the front of the grandstand. Officer Johnson followed the plaintiffs from the Ceremonial grounds to make sure that they left the grounds with the leaflets to avoid his having to try to keep a continual lookout to make sure that they were not handing out the leaflets on the grounds.

42. The defendant Johnson's action on August 16, 1969, was in accordance with Johnson's good faith understanding of his instructions from his supervisor and the District Attorney.

43. That Johnson did not touch any plaintiff at any time material herein other than on two or three occasions when he shook hands with Michael Benson or Eddie Brown nor did Kauzlaric or DiGregorio ever touch any of the plaintiffs at any time material herein.

44. That Officer Johnson was friendly and courteous to the plaintiffs at all times and did not use any abusive language in the presence of the plaintiffs. That all of the plaintiffs were courteous and polite to Officer Johnson and treated him with respect; however, all of the plaintiffs were afraid of Officer Johnson because he was a police officer and not because of anything that he did on Friday the 15th or Saturday the 16th.

45. That Kauzlaric and DiGregorio were friendly and courteous to Benson.

46. That defendant Johnson's conduct in executing

what he understood to be the instructions of the District Attorney was reasonable.

47. That defendant Johnson did not arrest the plaintiffs, or any of them, at any time.

48. That defendants, or any of them, did not wilfully, knowingly, or purposely deprive plaintiffs, or any of them, of any right or privilege secured to them by the Constitution of the United States, or of any right or privilege whatsoever.

49. That the Association through Kauzlaric acting as President of the Association acted under and in reliance upon the advice and counsel of the Assistant District Attorney Rich in Rich's capacity as Assistant District Attorney in withdrawing the Association's permission for Benson to be on the ceremonial grounds and that said acts were done in good faith.

50. That under the facts and circumstances as hereinabove set forth, all of the defendants acted in good faith.

51. That at no time herein did the defendants or any of them threaten or harrass the plaintiffs or any of them.

52. That at no time during August 15th or 16th, 1969, and subsequent thereto, did the defendants or any of them act in disregard of or in disdain for plaintiffs' constitutional rights secured to them by the Constitution of the United States or laws thereof by improperly releasing, obtaining, inspiring or encouraging newspaper publicity as a campaign against plaintiffs because of plaintiffs' acts or conduct on or off the Ceremonial grounds on said dates.

53. That the defendants, or any of them, did not individually or otherwise wilfully, knowingly, purposely or in concert with others or otherwise, deprive plaintiffs, or any of them, of any rights, privileges or immunities secured to

them by the Constitution of the United States or of any right or privilege whatsoever.

54. That there is no evidence of a conspiracy.

55. That each of plaintiffs' claims for monetary damages are conjectural, insubstantial and totally speculative.

56. That the Ceremonial grounds or property owned by the Association is not a public park maintained by the State of New Mexico or any subdivision thereof for the convenience, use, and recreation of the residents of Gallup and the general public, nor held out to be the same.

57. That the Ceremonial grounds is not a public street, way or park dedicated to public use and is not a place open to any person to be used as a public forum.

58. That the purposes to which plaintiffs attempted to use the Ceremonial grounds were inconsistent and contrary to the purposes and uses for which the Ceremonial grounds were dedicated to be used and was not the only place where plaintiffs could have transmitted their message.

59. That plaintiffs, during August 15th and 16th, 1969, passed out the leaflets outside the Ceremonial grounds at the entrances thereto and on the city streets of Gallup without any intervention by any persons.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of the plaintiffs' Amended Complaint.

2. That at all times herein defendant Jack Johnson was acting under color of law in the course and scope of his employment as a New Mexico State Police Officer.

3. That defendant Jack Johnson was specifically autho-

rized by N.M.S.A. §64-3-11, 1953 Comp., and N.M.S.A. §64-13-49, 1953 Comp., to obtain plaintiff Brown's driver's license and automobile registration on Friday, August 15, 1969.

4. After hearing a comment about burning the Ceremonial Association down and having seen Michael Benson run from the Ceremonial grounds, and attempt to hide from Officer Johnson, these acts constituted an appropriate circumstance for Officer Johnson to approach Benson and Brown to investigate possible criminal behavior, and Officer Johnson's conduct in stopping the car and requesting identification was, therefore, reasonable conduct by the police officer and was not a violation of any civil right or privilege and immunity guaranteed to the plaintiffs by the Constitution or any statute of the United States.

5. That none of the plaintiffs objected to identifying themselves to Officer Johnson. Johnson's obtaining their identification did not constitute a violation of any civil right or any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

6. That defendant Johnson did not detain plaintiffs Benson or Brown for any unreasonable length of time and any detention for a conversation between the three was consented to by Brown and Benson and as a result of such discussion on August 15, 1969, Johnson did not violate any privilege or immunity guaranteed to plaintiff Benson by the Constitution of the United States or by any statute of the United States.

7. That Officer Johnson acted reasonably under all the circumstances on Friday night, August 15, 1969, and his conduct did not constitute a violation of any privilege or immunity guaranteed to plaintiffs Benson or Brown by the

Constitution of the United States or by any statute of the United States.

8. Officer Johnson did not arrest plaintiff Benson or Brown on August 15, 1969, or at any other time.

9. In the event that probable cause should have been necessary for the conduct of Officer Johnson on Friday, August 15, 1969, such probable cause existed in his reading of the leaflet, hearing the comment about burning the Ceremonial facility down, observing Benson run from the group, and seeing Benson's attempt to hide from defendant Johnson in plaintiff Brown's car.

10. That defendant Johnson's actions were done in reasonable and good faith performance of his lawful duties as he understood them as a State Police Officer of the State of New Mexico, and, therefore, defendant Johnson is not liable to the plaintiffs for any violation of any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

11. That defendant Johnson was at all times on Saturday, August 16, 1969, acting for or at the express and implied directions of the Assistant District Attorney, a quasi-judicial officer, and with the express and implied direction and orders of his supervisor at the New Mexico State Police, and defendant Johnson is, therefore, immune for any violation of any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

12. That after defendant Association through Kaufmann, as President of the Ceremonial grounds, being the lawful custodian of the grounds, revoked the Association's permission for Benson to remain on the grounds handing out the leaflets, his continued presence on the grounds hand-

ing out the leaflets would have constituted a criminal trespass under the laws of the State of New Mexico and Benson could have been prosecuted for criminal trespass.

13. That after defendant Association through Kauzlaric, as President of the Ceremonial grounds, being the lawful custodian of the grounds, revoked his permission for Benson to remain on the grounds handing out the leaflets, his continued presence on the grounds handing out the leaflets would have constituted the misdemeanor of wrongful use of public property and it was the duty of defendant Johnson to attempt to prevent the commission of the misdemeanor which could have resulted in a breach of the peace.

14. That it was the duty of defendant Johnson to execute the express or implied direction of the District Attorney to make sure that the leaflet was not distributed on the Ceremonial grounds on Saturday, August 16, 1969.

15. That if there was any violation of any right, privilege or immunity secured to Benson by the Constitution or statutes of the United States, then such rights would have been violated by the decision made by the District Attorney, to-wit, that the defendant Kauzlaric had authority to withdraw his consent for Benson to remain on the grounds and hand out leaflets, and that the acts of Officer Johnson in determining that such legal decision was complied with were done in reasonable and good-faith performance of his lawful duties as a State Police Officer, and defendant Jack Johnson is not liable to Benson or the other plaintiffs for any violation of any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

16. That if there was any violation of any right, privilege, or immunity secured to Benson by the Constitution or statutes of the United States, then such rights would have

been violated by the legal decision made by the District Attorney, to-wit, that the defendant Kauzlaric had authority to withdraw his consent for Benson to remain on the grounds and hand out leaflets, and the acts of defendant Johnson were the result of an honest misunderstanding of his legal duties or an honest mistake of law and fact without realizing that his conduct might result in depriving Benson or the other plaintiffs of any rights or privileges secured to them by the Constitution or statutes of the United States and defendant Jack Johnson is not liable to the plaintiffs.

17. That defendant Johnson did not arrest any of the plaintiffs and, therefore, probable cause is not an element to consider

18. That none of the plaintiffs were threatened, harassed or intimidated by the defendants, or any of them.

19. That Kauzlaric and DiGregorio did not know nor were they required to know that their actions could conceivably be construed by Benson as depriving Benson of his constitutional rights.

20. That none of the plaintiffs were removed from the Ceremonial grounds by or at the request of the Association, Kauzlaric, DiGregorio or Merry, nor were plaintiffs otherwise threatened or intimidated by the Association, Kauzlaric, DiGregorio or Merry.

21. That the defendants at all times hereto acted lawfully, reasonably and with the good faith belief that their actions were required in order to protect against violation of the public peace and order, and in order to preserve the Ceremonial Association's property.

22. That the Ceremonial grounds is not a public street, way or park dedicated to public use and is not a place open to any person to be used as a public forum.

23. That the purposes to which plaintiffs attempted to use the Ceremonial grounds were inconsistent and contrary to the purposes and uses for which the Ceremonial grounds are dedicated to be used and plaintiffs did and could have transmitted their message at other places other than the Ceremonial grounds.

24. That the leaflet, and the conduct of the plaintiffs in connection therewith, was calculated to produce disturbance or interference with those in attendance at the Ceremonial.

25. That with thousands of spectators and Indians present and with due regard to the time and manner in which the leaflets were being distributed, and the impact upon those persons attending the Ceremonial activities, including those of Indian descent, the incidents that occurred prior, during and after the August 15, 1969 incident with Benson, Kauzlaric had reason to anticipate that the continued handing out of the leaflets would cause a substantial disruption or material interference with the Association's activities and, with due regard to the obligation of the Association to provide a safe place for the viewing of the Ceremonial, his conduct as President of the Association was required and said conduct and acts were reasonable, performed in good faith and in reliance upon the advice of the Assistant District Attorney.

26. That defendant Association, through its representatives, has the power to preserve the Ceremonial property for the use and purposes for which it was lawfully dedicated. The plaintiffs' acts, conduct, purposes and use of the Association's property was completely contrary to the uses and purposes for which the Association's property was lawfully dedicated by the State of New Mexico and the Association. Plaintiffs' right to use the Ceremonial grounds is a qualified

right or privilege and subject to reasonable regulation by officials of the Ceremonial Association and clearly subject to revocation with due regard to the facts and circumstances here involved.

27. That the Association is an agency of the State of New Mexico and is not a person within the contemplation of applicable Federal and Civil Rights statutes, and this action is a suit against a sovereign which has not consented to be sued and the defendants Kauzlaric, DiGregorio and Merry are sued in their official capacities, and this action as to all defendants should be dismissed.

28. No monetary or other damages can be found against the Association.

29. There is no evidence that the Association, Kauzlaric, DiGregorio or Merry acted under color of state law, statute, ordinance or custom to deprive the plaintiffs, or any of them, of their rights, privileges or immunities secured to them by the Constitution of the United States or any statute thereof.

30. Plaintiffs' claims for relief fail to state a claim upon which relief can be granted against any of the defendants, Association, Kauzlaric, DiGregorio, Merry or Johnson.

31. The acts and conduct of the plaintiffs at the times and under the circumstances as they existed, were performed in such manner that they were not constitutionally protected and the acts of the defendants Association, Kauzlaric, DiGregorio and Johnson under such circumstances did not deprive plaintiffs of their constitutionally protected or other civil rights and privileges.

32. That the defendants Merry and DiGregorio did not violate any rights, privileges or immunities secured to plaintiffs Brown, Hubbard or Tracy by the Constitution of the United States or any statute of the United States.

33. That the defendant Merry did not violate any rights, privileges or immunities secured to the plaintiffs by the Constitution of the United States or any statute of the United States.

34. That if plaintiffs were engaged in constitutionally protected activities or they were deprived of their civil rights, the actions of defendants Association, Kauzlaric, DiGregorio and Johnson were done reasonably and in good faith in the performance of their duties as they understood them in reliance upon the advice of the Assistant District Attorney without any intent whatsoever to deprive plaintiffs of any constitutional rights or other civil rights and privileges, and without the realization that their conduct might result in depriving plaintiffs of such rights and were, therefore, privileged.

35. That there is no actual justiciable controversy here involved.

36. That none of the plaintiffs suffered any compensatory damages as a direct or indirect result of any act or omission of defendants Association, Kauzlaric, DiGregorio, Merry or Johnson.

37. That any damages which plaintiffs may have suffered are conjectural, speculative and insubstantial.

38. That plaintiffs are not entitled to receive punitive damages from any of the defendants.

39. Insofar as injunctive relief is requested, the plaintiffs have not suffered irreparable injury and have a plain, adequate and speedy remedy at law.

40. That on August 15th and 16th, 1969, the acts and conduct of defendants were not a violation of any rights, privileges or immunities secured to plaintiffs Benson,

Brown, Hubbard or Tracy by the Constitution of the United States or any statute of the United States.

41. That the plaintiffs at all times were given the same right to and the full and equal benefit of all laws and proceedings for the security of their person and property as are enjoyed by white citizens.

42. That there was no conspiracy among the defendants to deprive plaintiffs, or any of them, either directly or indirectly, nor were any overt acts done by plaintiffs pursuant to a conspiracy to deny plaintiffs of any rights, privileges or immunities under the Constitution and laws of the United States, or the equal protection of the laws or of equal privileges and immunities under the laws of the United States or the State of New Mexico.

43. That the defendants have not violated any of the plaintiffs' rights under 42 U.S.C., Sections 1981, 1983, 1985 (3).

44. That the defendants are not liable to the plaintiffs and judgment will be entered dismissing the complaint, together with the cause.

Dated this 7th day of August 1970.

EWING T. KERR
Judge, United States District Court,
assigned.

APPENDIX C

[448 F.2d 1371]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

September Term, 1971

MICHAEL BENSON, LINDA HUBBARD and JUNE TRACY, for themselves and on behalf of a class of persons similarly situated; EDDIE BROWN, Guardian Ad Litem for minor plaintiffs Michael Benson, Linda Hubbard and June Tracy,

Plaintiffs-Appellants,

vs.

JOSEPH L. RICH, EDWARD S. MERRY, JACK JOHNSON, CHRIS DiGREGORIO, RICHARD KAUZLARIC and THE INTER-TRIBAL INDIAN CEREMONIAL ASSOCIATION, a corporation,

Defendants-Appellees.

FILED
United States
Court of
Appeals
Tenth Circuit
Oct. 18, 1971
HOWARD
K. PHILLIPS
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(No. 8215 — Civil)

Donald Juneau, Window Rock, Arizona (Willard F. Kitts, Albuquerque, New Mexico, with him on the brief), for Appellants.

Kenneth Harrigan, Albuquerque, New Mexico, for Appellee Rich; Paul D. Gerber, Santa Fe, New Mexico (Harl D.

Byrd, Santa Fe, New Mexico, with him on the brief), for Appellees Merry, DiGregorio, Kauzlaric and the Inter-Tribal Indian Ceremonial Association; Robert G. McCorkle, Albuquerque, New Mexico, for Appellee Johnson.

Before MURRAH, PICKETT and DOYLE, Circuit Judges.

PICKETT, Circuit Judge.

The appellants in this civil rights case are four young Navajo Indians who allege that their constitutional rights were infringed upon when officials of the Inter-Tribal Indian Ceremonial Association[1] prevented them from distributing printed leaflets during an Indian Ceremonial at Gallup, New Mexico during the month of August, 1969. In their complaint the appellants sought injunctive relief and damages. The action was dismissed as to two of the defendants in summary proceedings and after a trial on the merits the court held that the actions of the Association officials were not of such a nature as to deprive any of the appellants of constitutional rights and entered judgment for the appellees. We conclude that the record supports the court's findings. It is, therefore, only necessary to discuss herein the issue pertaining to the constitutional question.

The Ceremonial is recognized throughout the United States as an outstanding Indian function. It consists of four days of rodeos, arts and crafts exhibits, parades, Indian dances and other related performances and activities. The public is invited and is admitted to the grandstands on the Ceremonial Grounds upon payment of an admission charge. Attendance at each performance is about 8,000 persons, a substantial percentage of whom are of Indian descent.

[1] The Association is an official state agency created by N.M.S.A. § 73-31-1 (1953 Comp.). It is a non profit corporation created for the purpose of encouraging the preservation and development of Indian arts and crafts among the Indian tribes of the State of New Mexico. A further purpose is to encourage the preservation of traditional rites and ceremonials of Indian tribes and pueblos, and to afford an opportunity for the development of knowledge and appreciation of Indian arts, crafts, rites and ceremonials among other people. The Ceremonial at Gallup has been an annual affair since 1922.

Appellant Benson was critical of the manner in which the Ceremonials were conducted and decided to express his views to those in attendance through the distribution of a leaflet which he had prepared and had printed. In the distribution of these leaflets he enlisted the help of friends, including the other appellants.[2] The leaflet was entitled: "When Our Grandfathers Carried Guns." The first sentence read: "When our grandfathers carried guns, they were free and they were people." Another sentence read: "If we the Indians of today were like our grandfathers, we would not allow this Ceremonial to be held year after year in this manner and at this place." Many of the leaflet statements were emotional and highly critical of the Ceremonial and the general treatment of Indians by the people of Gallup. It concluded with the statement in reference to the Indians that "They were people . . . when their grandfathers had guns."

The Ceremonial officials had no advance information that the leaflets were to be distributed and it was called to their attention for the first time when Benson was observed in an area where large numbers of people were entering and leaving the grandstand. Witnesses described Benson's action as blocking the entrance and was referred to by one witness as a disturbance. There was testimony to the effect that the leaflets were being "stuffed" into the hands or arms of people.[3] Thereafter there was a conference between Benson and appellees DiGregorio, grandstand supervisor, Kauzlaric, Association president, and Johnson, a police officer. The discussion was friendly and Benson left after it was agreed that the distribution of the leaflets on the Ceremo-

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[2]The evidence shows that all the discussions relating to the distribution of the leaflets were between Benson and some of the appellees, with no contact of any kind with other appellants.

[3]The trial court found that when Benson was first observed handing out leaflets he was standing near the exit aisle of the main entrance to the grandstand during intermission and was "obstructing the orderly flow of the pedestrian traffic."

ial Grounds would be discontinued. Immediately thereafter Benson joined a group of young Indians, all of whom engaged in a discussion concerning the leaflet. Benson told the group, "That cop took away my leaflets." A member of the group was heard to say that if Benson so desired, the group would tear apart or burn down the Ceremonial facilities. Shortly thereafter they all left the Ceremonial Grounds.

The following day Benson and others appeared at the Ceremonial Grounds and began handing out the leaflets. Kauzlaric then discussed the matter with an assistant state district attorney concerning the impact which the material in the leaflet might have upon people generally, and particularly those of Indian descent. This discussion included a recount of the remark about tearing apart or burning down the facilities which had been heard previously by Officer Johnson. The assistant district attorney concluded that the leaflet was a "call to arms" to the Indians and believed that it was necessary that the distribution be halted to prevent possible disorders or riots on the grounds.[4] It was agreed that if Benson and his followers, after a warning, continued in their activities, arrests should be made. This information was conveyed to Benson, whereupon he and others discontinued the distribution of the leaflets on the Ceremonial Grounds and left. No arrests were made. No attempts were

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[4]The trial court found:

"That the Assistant District Attorney interpreted the contents of the leaflet to amount to a call to arms and under the circumstances and the impact which the leaflet could have upon the thousands of people, including many of Indian descent, arriving for the afternoon performance on August 16, 1969, and the events of August 15, 1969, the Assistant District Attorney believed that a substantial disruptive material interference could develop and lead to a riot situation and upon being informed by the District Attorney that the Ceremonial grounds were private property advised Kauzlaric that he, as President of the Association, could withdraw Benson's permission to be on the Ceremonial grounds if he continued to pass out the leaflets and if Benson continued to do so then a criminal complaint could be made by the Association and Benson could be arrested for criminal trespass. Based upon this advice Kauzlaric informed Johnson that Kauzlaric, as President of the Association, was denying Benson's permission to be on the grounds if he continued to pass out the leaflets."

made to prevent the circulation of the leaflets at any place except on the Ceremonial Grounds near the grandstands, and the evidence confirms that they were widely distributed throughout the City of Gallup, particularly along a street parade route."

The law is settled that the distribution of pamphlets and leaflets is a form of communication protected by the First Amendment and "so long as the means are peaceful, the communication need not meet standards of acceptability" to others. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Lovell v. Griffin, 303 U.S. 444 (1938). Neither does the desire to avoid the discomfort or inpleasantness which a communication may contain; if it does not interfere with the orderly function of a public activity, justify the prohibition of the particular expression of views or opinions. Tinker v. Des Moines School District, 393 U.S. 503, 509 (1969). It is equally well settled that the state has the power to protect and preserve its property for the use to which it was dedicated, and there is no constitutional right to distribute pamphlets or leaflets whenever or wherever one pleases. Adderley v. Florida, 385 U.S. 39 (1966). The right of free speech does not mean that everyone with opinions or views may express them at any public place or at any time. "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. * * * A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection." Cox v. Louisiana, 379 U.S. 536, 554 (1965); American Communications Assn., C.I.O. v. Douds, 339 U.S. 382, 389 (1950).

The officials in charge of the Gallup Ceremonials were familiar with the possibility of violent disorders which could erupt as a result of distribution of inflammatory statements during the ceremonies. They believed that the inflammatory statements directed against the officials and people of the City of Gallup could anger a large segment of individuals attending the ceremonies and create a riotous situation. They were aware of a statement made to Benson by one of a group of young Indians to the effect that upon a suggestion from Benson, the Ceremonial facility would be torn apart or burned. The officials were concerned because Benson, after agreeing not to distribute the leaflets on the Ceremonial Grounds, had renewed his activities without further consultation with the officials. Under these circumstances, those in charge could take reasonable and good faith action to prevent a disastrous situation which they had reason to believe could occur. The trial court found that these conditions existed and the sufficiency of the evidence to sustain the findings is not questioned.

There was a clear and present danger of violence and disorder and the officials were not required to wait until the feared conditions actually happened to take preventive action. In a somewhat similar situation, the court said, in Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195, 199 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970): "It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities had the right to nip such action in the bud and prevent it in its inception. * * *" In Feiner v. New York, 340 U.S. 315 (1951), the Court, quoting from Cantwell v. Connecticut, 310 U.S. 296 (1940), used this language: "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement

to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."

Communities have an interest in maintaining peace and order in their areas, particularly on public property. Indeed, they have that duty, but the free discussion and dissemination of ideas and opinions cannot be suppressed under the guise of conserving the peace. The principle involved in Feiner v. New York, *supra,* is similar to the one presented here, and the following statement of the Court is appropriate: "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. * * *" Feiner v. New York, 340 U.S. 315, 321 (1951). The action of the public officials was not directed toward the dissemination of ideas or opinions, but solely to maintain peace and order on the Ceremonial Grounds and the prevention of violence and a riotous situation. No attempt was made to prevent the circulation of the leaflets elsewhere.

AFFIRMED.

APPENDIX D

WHEN OUR GRANDFATHERS CARRIED GUNS. . .

When our grandfathers carried guns, they were free and they were people. The Anglos had to reckon with them and the Anglos were careful not to anger our People. Our grandfathers stood up for what they felt was right and they condemned what they knew was wrong. If we the Indians of today were like our grandfathers, we would not allow this Ceremonial to be held year after year in this manner and at this place.

The Ceremonial does not give a true picture of the Indian. Just because Indians sing and dance for you, that does not mean that they are happy. The City of Gallup calls the Ceremonial "A Tribute to the American Indian." Do not believe it. At the night performances, you will hear what a proud and happy people we are. Do not believe that either. Do not think that The City of Gallup respects the Indian because it gives them a free barbeque.

Do not let the Ceremonial let you forget that Indians have the highest unemployment rate in the country, the highest infant mortality rate in the country, the lowest average income of any group in the United States, the highest suicide rate in the country, the highest dropout rate in the U.S., and don't forget that many of the Indians you see are suffering from malnutrition. You will see many drunk Indians. Ask yourself why you see so many. Is it because they are happy and proud?

You should also ask yourself why the Ceremonial is held to benefit the City of Gallup, N.M. Ask yourself why Indians are not in charge of the Ceremonial. Ask yourself why the Ceremonial is not moved to an Indian reservation; since there are so many of them in the area. If you are brave enough to see what what the City of Gallup thinks of the In-

dian, find out where the Gallup Indian Community Center is located and see it for yourself. Note that it is dirty and in need of repair. In a study made of the economy of Gallup last summer it was learned that about 72% of the business was carried on with Indians as customers. It was also learned that the merchants of Gallup contribute very little to the Indian Center.

Gallup provides little in the way of public services to the Indian. The City policeman are seen many times savagely beating helpless drunk Indians. But Gallup continues to call itself the "Indian Capital of the World." Recently Gallup decided it needed a flag. Most of the entries so far make use of Indian designs and figures and most are designed by non-Indians. The Ceremonial is only one example of how Gallup capitalizes on the Indian.

You will see many Indians at the Ceremonial and you will ask, "Why don't they protest?"

The answer is that we have learned that it is useless to ask for better things and so we settle for what we are given.
As you look at the drunk Indians and as the Indians dance and sing for you and as you hear what a happy people they are, say to yourself: "They were people . . . when their grandfathers had guns."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-930

MICHAEL BENSON, JUNE TRACY, EDDIE BROWN and LINDA HUBBARD,

Petitioners,

vs.

JOSEPH RICH, JACK JOHNSON, CHRIS DiGREGORIO, EDWARD S. ("IKE") MERRY, and RICHARD KAUZLARIC,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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February 11, 1972

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Only the second question in the Petition for a Writ of Certiorari relates to these respondents. Respondents object to the inaccurate and argumentative manner in which petitioners have stated the question. It may be more accurately stated by paraphrasing the Opinion of the Circuit Court of which review is sought:

> Under circumstances where respondents had reason to believe there was a clear and present danger of violence and disorder, could they take reasonable and good faith action to prevent the same? 448 F.2d at 1374.

STATEMENT OF THE CASE

Petitioners have not at any point in the appellate review of this case challenged the District Court's findings made after trial on the merits. (Appendix B to the Petition) Yet, in the Statement of the Case in their Petition, they present a new and unique statement of the "facts" which are inconsistent with both the District Court's findings (which the Circuit Court found specifically were supported by the record, 448 F.2d at 1372) and the facts as summarized by the Circuit Court in its Opinion, and this is done without a single reference to the record or the Appendix filed in the Circuit Court. The Petitioners' Statement may, therefore, be disregarded. The following Statement of the Case is intended only to very briefly summarize the unchallenged summary of the facts of the District and Circuit Courts with the record support therefor.[1]

The setting for the events giving rise to Petitioners' action in this case was the 1969 Inter-Tribal Indian Ceremonial held on the Ceremonial Grounds at Gallup, New Mexico. This is an annual event put on by the Inter-Tribal Indian Ceremonial Association[2] for the exhibition of Indian arts, crafts, and other products and for education of and about the American Indian. The objectives of the Ceremonial are accomplished through volunteer participation at all levels by Indians from across the country. (Findings of Fact 1 through 4; A. 160-66)

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[1] Record references will be made by reference to the Appendix filed in the Circuit Court, said Appendix having been transmitted to the Supreme Court. References to Findings of Fact will be to those made following the conclusion of the trial and reproduced in Appendix B to the Petition.

[2] While the Association was a defendant in this action in the District Court and was named by petitioners as an appellee in the Circuit Court, the petitioners have not included the Association as a respondent in their Petition to this Court. Before the District Court the Association had been dismissed as a defendant in the damage portion of the action, and during the trial the petitioners abandoned the injunctive portion of their action as to all respondents represented herein, and limited their action to their damage claim. (A. 300-01)

Mr. Benson is the only petitioner who at any time had any contact with the respondents represented herein. (Finding of Fact 8; A. 127-28, 143-44, 148, 203) Mr. Benson and others began distributing leaflets entitled, "When our Grandfathers Carried Guns" on the Ceremonial Grounds on Friday, August 15, 1969. (A. 64-65, 72-73, 85-86; see Appendix D to the Petition) The first contact between the parties occurred after 10:00 p.m. at the main exit to the grandstand on the Grounds. During an intermission of a grandstand performance, Mr. Benson took up a position at the main grandstand exit so that he was "obstructing the orderly flow of the pedestrian traffic" and began "stuffing" leaflets into the hands of those attempting to use the exit. (Findings of Fact 15 and 16; A. 170, 178-79) During the intermission the exits are particularly crowded and at this time the main exit was completely jammed so that no one else could get through it. (A. 179-80, 246-47) The concourse area outside the exit was also congested. (Finding of Fact 11; A. 128-30)

Respondents DiGregorio (who was grandstand supervisor) and Kauzlaric (who was President of the Association) became aware of what was characterized as a disturbance and disruption of traffic at the main entrance and became the first to have any contact with Mr. Benson. (Findings of Fact 6 and 16; A. 170-73, 181-82, 187-88) There followed a discussion among these three and respondent Johnson, a state police officer assigned to duty on the Ceremonial grounds. (Finding of Fact 18; A. 173-74, 183-85, 238-39) Concerned about further disturbance that could arise because of the manner and place that the leaflets were being passed out, Mr. Kauzlaric gave Mr. Benson his business card and offered to talk with him then, or at any other time, about his objections to the Ceremonial and the leafletting activities. (Finding of Fact 20, A. 84-85, 186-89, 206-07, 219) While Mr. Benson was not requested to leave the grounds, it was agreed that he would not again distribute the leaflets until he and Mr. Kauzlaric had had

a chance to discuss the matter. (Finding of Fact 20; A. 189-93, 207-08)

Petitioners Benson and Brown, still on the Grounds, then met with a group of ten or twelve young people. (Finding of Fact 21; A. 240) From this group Officer Johnson overheard someone state that if Mr. Benson wanted, they would "tear apart or burn the Ceremonial facility down." (Finding of Fact 21; A. 131, 240) Messrs. Benson and Brown then "rushed" from this group to Mr. Brown's car where Mr. Benson, for some unexplained reason, attempted to hide in the car. (Finding of Fact 22; A. 88-89, 219-20) Officer Johnson stopped and talked to the boys in what was described by all as a friendly and social manner, and Mr. Benson indicated that he was not planning on again distributing his "Guns" leaflet on the Grounds. (Findings of Fact 22 and 23)

The next day, Saturday, Mr. Benson printed 700 more leaflets (same content) and began passing them out along the Ceremonial parade route in Gallup. (A. 77-78, 140) He and Petitioners Tracy and Hubbard then returned to the Ceremonial Grounds and continued their leafletting. (Finding of Fact 29; A. 140-41) No discussion had been had with Mr. Kauzlaric, nor had Mr. Benson sought such a discussion.

In view of the disturbance on Friday, the agreement Mr. Kauzlaric had with Mr. Benson about not passing out more leaflets until discussing the matter with him, and the report he had received from Officer Johnson concerning the threat to destroy the facilities and the peculiar behavior of Mr. Benson on the previous evening, Mr. Kauzlaric was apprehensive about the reappearance of Mr. Benson. (Findings of Fact 28 and 30) He, therefore, discussed the situation with the Assistant District Attorney, respondent Rich, and the District Attorney for McKinley County, and sought their help and advice as to what might be done to prevent a disturbance and disruption on the Ceremonial Grounds. (Finding of Fact 30; A. 193-201, 210-11,

213-15, 266-72) A discussion ensued as to the manner in which, and the place where, the leaflets were being distributed, their content, whether they were provocative and would cause a disturbance, and whether they interfered with the rights of others to enjoy the Ceremonial and related matters. (Finding of Fact 31; A. 267-76, 282-84) In view of the surrounding events and the content of the leaflet, Mr. Rich stated that he considered the leaflets a call to arms and believed that a substantial disruptive interference with the Ceremonial activities could develop and lead to a riot situation. (Finding of Fact 31; A. 284-91, 296-97)

Relying upon the advice of the Assistant District Attorney, Mr. Kauzlaric revoked Mr. Benson's permission to be on the Grounds so long as he continued to pass out the leaflets and so informed Officer Johnson. (Finding of Fact 31; A. 211-12) Following discussions between Officer Johnson and the Assistant District Attorney, and between Mr. Benson and the Assistant District Attorney, the petitioners left the confines of the Ceremonial Grounds and, without objection, continued their leafletting in the less congested area immediately outside the Grounds. (Findings of Fact 33 through 37; A. 81-82, 211-12, 230-35)

At no material time did respondent Merry have any contact, directly or indirectly, with any of the petitioners. (Finding of Fact 9)

Thus ended the events upon which petitioners base their claims against respondents. It should be noted that at the trial of this case petitioners limited the issues as to the respondents represented herein to the damage claims after they had been invited to participate in the drafting of regulations regarding leafletting. (A. 300-01, 307-08) As respondent Johnson points out, petitioners are not entitled to recover damages in this case. (Memorandum Opposing Certiorari, p. 2)

ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

Respondent Rich will address his brief in opposition to section "A" of Petitioners' Reasons for Allowance, and these respondents will confine this brief to section "B".

Petitioners have misconstrued the decision of the Circuit Court and the import of that decision. Petitioners attempt to limit the basis for the Circuit Court's decision to two isolated factual premises – and they challenge one of those. (Petition, p. 9) As to the challenged factual premise, it is fully supported by the District Court's Findings and the evidence before that Court.

The Circuit Court uses fully half of its Opinion to discuss the facts of this case based upon an independent review of the record – not just the two isolated facts cited by petitioners. 448 F.2d at 1372-73. The Court then clearly recognizes the very strict standards for measuring limitations on free speech that petitioners, in effect, urge were ignored by the Court. 448 F.2d 1373-74. The Court then turns to the application of these standards to this case:

> " . . . Under these circumstances, those in charge could take reasonable and good faith action to prevent a disastrous situation which they had reason to believe could occur. . . .
>
> "There was a clear and present danger of violence and disorder and the officials were not required to wait until the feared conditions actually happened to take preventive action. . . .
>
> " . . . The action of the public officials was not directed toward the dissemination of ideas or opinions, but solely to maintain peace and order on the Ceremonial Grounds and the

prevention of violence and a riotous situation. . . ." 448 F.2d at 1374.

No case cited by petitioners is in conflict with this holding. On the contrary, it is consistent with past decisions of both this Court and the Circuit Courts.

Petitioners cite five purportedly inconsistent cases. (Petition, p. 12)[3] The first is *New York Times Company v. United States*, 403 U.S. 713 (1971). Respondents are frank to admit that they are unable to understand on what basis petitioners claim that the "Pentagon Papers" case can be considered inconsistent with the instant case. The Court's decision on the facts of that case – too well known to require reiteration here – offer little guidance to a decision on the very different facts of this case. If any comparison can be made, it is that the Circuit Court in this case recognized the same strict standard cited in the *New York Times Co.* case for the impairment of First Amendment rights.

Cohen v. California, 403 U.S. 15 (1971), and *Bachellar v. Maryland*, 397 U.S. 564 (1970), were decisions holding only that criminal prosecutions based solely on the objectionable content of speech were not constitutionally permissible.

> "The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only 'conduct' which the state sought to punish is the fact of communication." *Cohen v. California*, 403 U.S. at 18.

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[3] Petitioners also discuss *Terminiello v. Chicago*, 337 U.S. 1 (1949). This case involved only an over-broad jury instruction which stretched a disorderly conduct statute beyond permissible constitutional limits. In the instant case both courts found that the circumstances went far beyond simply stirring the public to anger, inviting a dispute, or bringing about a condition of unrest, which standards were disapproved in *Terminiello*. 337 U.S. at 5.

> "Thus, on this record, we find that petitioners may have been found guilty of violating Section 123 simply because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions." *Bachellar v. Maryland*, 397 U.S. at 570.

As recited above, however, the facts of the instant case disclose much more than the dissemination of ideas through mere "speech." Moreover, the Circuit Court was emphatic in recognizing the very principle enunciated in *Cohen* and *Bachellar* by determining that the facts of this case went beyond mere "speech." 448 F.2d at 1373.

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), held that it was impermissible to enjoin distribution of literature "of any kind" in an entire city (of 18,000 people) when the trial court had found that

> " . . . distribution of leaflets was on all occasions conducted in a peaceful and orderly manner, did not cause any disruption of pedestrian or vehicular traffic, and did not precipitate any fights, disturbances or other breaches of the peace." 402 U.S. at 417.

The facts of that case make it not comparable to the instant case, but the holding, nonetheless, is certainly not inconsistent with the Circuit Court's in this case.

Finally, *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), lends no support to petitioners' contentions. The Court there held that the injunction

> " . . . must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice

> to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings." 393 U.S. at 180.

While there was no court proceedings involved in the instant case, it is worth noting that petitioners chose to ignore the offer of respondents to participate by discussion in all matters concerning leafletting activities and the petitioners' objections to the Ceremonial.

Moreover, the Court in *Carroll* specifically held that "we need not and do not decide whether the facts in this case provided a constitutionally permissible basis for temporarily enjoining the holding of the August 7 rally." 393 U.S. at 185.

Respondents oppose this Petition for a Writ of Certiorari, however, not only because the decision is not inconsistent with the cases cited by petitioners, but also because respondents believe that the decision is a correct application of well established precedent. In applying the law to the facts of this case, the Circuit Court relied principally upon: *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana* (I), 379 U.S. 536 (1965); *Feiner v. New York*, 340 U.S. 315 (1951); *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Norton v. Discipline Committee of East Tennessee State University*, 419 F.2d 195 (6th Cir. 1969), *cert. den.* 399 U.S. 906 (1970)[4] Petitioners fail to even note four of these cases in their Petition, do not discuss a fifth *(Cantwell)* that is merely cited, and fail, except for a conclusory statement, to attempt to distinguish the sixth *(Feiner)*.

Respondents contend that the dictates of the law as set

[4] We add, with respect to the reasonableness of respondents' actions based upon the advice of counsel, the recent case of *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970), *cert. den.* 401 U.S. 981 (1971).

forth in these cases were carefully adhered to by the Circuit Court in this case and in this memorandum in opposition to the Petition will not attempt to restate the arguments made on the merits before the Circuit Court. A single passage from *American Communications Ass'n., C.I.O. v. Douds, supra,* describing the conflict that must be resolved by the courts will be cited:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. . . .
>
> "On the other hand, legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights." (citations omitted) 339 U.S. at 399.

Respondents believe that both the District and Circuit Courts in this case correctly resolved the conflict on the facts presented to them.

In summary, none of the respondents have contended that they have the right to absolutely preclude petitioners from

distributing leaflets on the Ceremonial Grounds. But they do contend, as petitioners have consistently agreed (e.g., A. 307-08), that they have the right to impose reasonable restrictions on activities so as to permit the use of the Grounds for the purposes for which they are lawfully dedicated. While no regulations existed at the time of the 1969 Ceremonial concerning this type of activity, the Association certainly could not be denied the right to take reasonable steps to stop the type of disruptive activity Mr. Benson seemed intent upon engaging in.

CONCLUSION

For the foregoing reasons, respondents, Chris DiGregorio, Edward S. ("Ike") Merry, and Richard Kauzlaric, respectfully request that the Petition for a Writ of Certiorari in this cause be denied.

Respectfully submitted,

BIGBEE, BYRD, CARPENTER & CROUT

By: _____
Harl D. Byrd

_____
Paul D. Gerber

Attorneys for Respondents, Chris DiGregorio, Edward S. ("Ike") Merry and Richard Kauzlaric

DATED: February 11, 1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-930

MICHAEL BENSON, JUNE TRACY, EDDIE BROWN and LINDA HUBBARD,
Petitioners,

vs.

JOSEPH RICH, JACK JOHNSON, CHRIS DiGREGORIO, EDWARD S. ("IKE") MERRY, and RICHARD KAUZLARIC,
Respondents.

MEMORANDUM OPPOSING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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Respondents.

MEMORANDUM OPPOSING CERTIORARI

Petitioners contend that Respondent Jack Johnson, a New Mexico State Police Officer, along with the other Respondents, violated their civil rights when Petitioners were prevented from handing out leaflets at the 1969 Inter-Tribal Indian Ceremonial in Gallup, New Mexico. The case was tried non-jury before the Honorable Ewing T. Kerr, who made unchallenged findings of fact and conclusions of law and entered Judgment for Respondent Jack Johnson, set forth in Appendix A.

For purposes of this Court's consideration of the case, it is uncontested that Respondent Johnson acted in good faith and on the instructions of the District Attorney (Findings of Fact Nos. 42, 46, and 50). Such good faith

is a legally sufficient defense which would bar any liability for monetary damages against Respondent Jack Johnson, even if Petitioners' First Amendment rights were violated. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Anderson* v. *Nosser*, 438 F.2d 183, 195 (5th Cir. 1971).

Further, the Petitioners failed to prove any damages at the trial on the merits (Finding of Fact 55). A violation of civil rights does not result in damages without proof supporting damages, which Petitioners failed to establish in this case. *Joseph* v. *Rowlen*, 425 F.2d 1010 (7th Cir. 1970). If this Court should grant certiorari and accept Petitioners' First Amendment claims, Petitioners would still not be entitled to monetary damages, and this Court would be required to affirm the Judgment and Appellate opinion below in favor of Respondent Jack Johnson.

Therefore, the Petition for Writ of Certiorari as to Respondent Jack Johnson should be denied.

Respectfully submitted,

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and

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By .....
ROBERT G. MCCORKLE

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 8215 Civil

MICHAEL BENSON, LINDA HUBBARD, JUNE TRACY and EDDIE BROWN,
Plaintiffs,

vs.

THE INTER-TRIBAL INDIAN CEREMONIAL ASSOCIATION, EDWARD S. (IKE) MERRY, JACK JOHNSON, CHRIS DIGREGORIO and RICHARD KAUZLARIC,
Defendants.

Judgment of Dismissal

The above entitled matter having come on regularly for hearing before the Court, sitting without a jury, and at the conclusion of said trial the Court took said matter under advisement, and having considered the evidence, the exhibits, the pleadings, the memorandum submitted by plaintiffs and the authorities submitted by the defendants, and having prepared and filed herein its Finding of Fact and Conclusions of Law finding generally for the defendants and against the plaintiffs, now, therefore, it is

ORDERED that the complaint, together with the cause, be, and the same is hereby dismissed.

IT IS FURTHER ORDERED that defendants have their cost herein expended, to be taxed by the Clerk.

Dated this 7th day of August, 1970.

Ewing T. Kerr
Judge, United States District Court,
Assigned

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 8215 Civil

MICHAEL BENSON, LINDA HUBBARD, JUNE TRACY and EDDIE BROWN,
Plaintiffs,

vs.

THE INTER-TRIBAL INDIAN CEREMONIAL ASSOCIATION, EDWARD S. (IKE) MERRY, JACK JOHNSON, CHRIS DiGREGORIO and RICHARD KAUZLARIC,
Defendants.

Findings of Fact and Conclusions of Law

The above entitled matter having come on regularly for hearing before the Court, sitting without a jury, the plaintiffs appearing by and through their counsel, Theodore R. Mitchell and Robert C. Hanna, and the defendant the Inter-Tribal Indian Ceremonial Association, Edward S. (Ike) Merry, Chris DiGregorio and Richard Kauzlaric appearing by and through their counsel Harl D. Byrd of the firm of Bigbee & Byrd, and the defendant Jack Johnson appearing by and through his counsel Robert G. McCorkle of the firm of Rodey, Dickason, Sloan, Akin & Robb and Miss Joyce Blalock, Assistant Attorney General for the State of New Mexico, and the Court having heard the testimony offered for and on behalf of the plaintiffs and the evidence adduced for and on behalf of the defendants, took said matter under advisement. The Court now having considered the pleadings, the testimony and exhibits, together with the memorandum submitted by plaintiffs and the authorities submitted by the defendants, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the Inter-Tribal Indian Ceremonial Association is and has been a nonprofit corporation organized under and by virtue of the laws of the State of New Mexico and is hereinafter referred to as "Association".

2. In 1939 the Association was designated by the State of New Mexico pursuant to Section 73-31-1, New Mexico Statutes Annotated, 1953 Compilation, as amended, and is an official agency of the State of New Mexico for the purpose of encouraging the preservation and development of Indian Arts and Crafts among Indian tribes and pueblos of the State of New Mexico; encouraging the preservation of traditional rites and ceremonials of the Indian tribes and pueblos; and for the development of knowledge and appreciation of Indian arts, crafts, rites and ceremonials among other people.

3. The Association owns real property with the improvements thereon, commonly called Lyon Memorial Park located in McKinley County, New Mexico, near the city of Gallup, State of New Mexico.

4. The Articles of Incorporation which were in effect at the time this controversy arose are as follows:

"(a) The provision of facilities for the operation and conduct of the Inter-Tribal Indian Ceremonial; the exhibition of agricultural and husbandry products produced by the American Indians; display and exhibition of Indian blankets, pottery, baskets, silverware, jewelry, furniture and other articles made by Indians; the exhibition of all handwork, writings, paintings, etc., of Indian school children; in fact the exhibition of any product made, produced or raised by the American Indian which will further their education or the education of others interested.

(b) For provision of facilities for the various Indian Tribes to exhibit or perform their various tribal or individual dances, religious ceremonies, songs and sports or any other performance or exhibition that may tend to educate the Indians themselves or others interested in Indian Folklore, history or religion".

5. The By-Laws of the Association which were in effect at all material times hereto provide in part that:

"1. The management of this Association shall vest in a BOARD OF DIRECTORS consisting of Twelve (12) members.

3. Memberships in this Association may be held by any person, firm or corporation and shall not be listed in the number held by any such person, firm or corporation. The membership fee shall be Ten ($10.00) Dollars and shall be paid at the time of making application for membership. A membership in this Association shall be for One (1) year only, but may be renewed from year to year upon the payment of the membership fee.

6. Each membership shall entitle the holder thereof to One (1) vote at all meetings of the Association.

9. The Financial Support of this Association shall be derived from Membership Fees, Gifts, Donations and monies received from the exhibits at the Ceremonial. The monies so received by this Association shall be used only for the following purposes:

(a) The provision of facilities for the operation and conduct of the Inter-Tribal Indian Ceremonial; the exhibition of Agricultural and Husbandry products produced by the American Indians; display and exhibition of Indian blankets, pottery, baskets, silverware, jewelry, furniture and other articles made by Indians; the exhibition of all handwork, writings,

paintings, etc., of Indian school children; in fact, the exhibition of any product made, produced or raised by the American Indian which will further their education or the education of others interested.

(b) For provision of facilities for the various Indian Tribes to exhibit or perform their various tribal or individual dances, religious ceremonies, songs and sports or any other performances or exhibitions that may tend to educate the Indians themselves or others interested in Indian folklore, history or religion".

6. That defendant Richard Kauzlaric, was President of the Association, defendant Edward S. Merry was employed by the Association as Executive Director, and defendant Chris DiGregorio was employed as Grandstand Supervisor.

7. That the defendant Jack Johnson was acting in the course and scope of his employment and duties as a New Mexico State Police Officer and was on assignment at the Inter-Tribal Indian Ceremonial at Gallup, New Mexico.

8. At no time herein, did the Association, Kauzlaric, DiGregorio or Merry ever have any direct or indirect contact with any of the plaintiffs Brown, Hubbard or Tracy.

9. That at no time herein did the defendant Merry ever have any direct or indirect contact with any of the plaintiffs, Benson, Brown, Hubbard or Tracy.

10. The 1969 Association ceremonial was held on August 14th through 17th, 1969, on its property described in Finding of Fact number 3. There were afternoon and evening performances presented to persons occupying a grandstand and bleachers. The Association grounds are fenced and automobiles entering the grounds are charged a parking fee while pedestrians are admitted to the Asso-

ciation grounds without charge and also charges are made for admission to the grandstand and bleachers for the performances.

11. That the main entrance and exit of the grandstand is located in the center of the structure which exits into a restricted area called the concourse and in which concourse area there are several refreshment stands. The concourse area, prior to, during intermissions and after the various performances, is a highly congested area with persons entering and leaving the grandstand, purchasing refreshments, which area is kept free from obstructions so that an orderly flow of persons may be maintained. During performances there are still many hundreds of people in the concourse area with thousands of others on the ceremonial grounds viewing the exhibits or in the process of coming from and going to the various activities held on the ceremonial grounds.

12. During the ceremonial most ceremonial officials and employees wear bright colored velveteen shirts and pants and defendants Kauzlaric and DiGregorio were wearing the same during these performances.

13. The grandstand and bleachers were substantially occupied by spectators during the evening performance of Friday, August 15, 1969.

14. That during the evening of August 15, 1969, a lady showed plaintiffs' Exhibit No. 1 to Kauzlaric and asked him where she could obtain another copy, which was the first knowledge Kauzlaric had of plaintiffs' Exhibit No. 1.

15. That at approximately 10:00 P.M. on Friday, defendant Johnson observed plaintiff Michael Benson handing out leaflets Plaintiffs' Exhibit No. 1, while Benson was standing very near the exit aisle of the main entrance of the grandstand on the Ceremonial grounds during inter-

mission and observed that Benson, in such a position, was obstructing the orderly flow of the pedestrian traffic. Johnson approached Benson and was handed a leaflet and then stepped back away from the flow of traffic, and moved several feet from Benson and read the first two or three paragraphs of the leaflet.

16. That at the August 15, 1969, evening performance, at or about 10:00 o'clock P.M., DiGregorio, grandstand supervisor, observed Benson standing in or near the exit aisle of the main entrance of the grandstand in such a manner that he was blocking or disturbing the orderly flow of the spectators exiting from the grandstand while passing out copies of plaintiffs' Exhibit "1" into the arms of spectators passing by him DiGregorio approached Benson and asked him what he was doing and Benson replied to the effect it was none of DiGregorio's business whereupon DiGregorio reached for a leaflet and whereupon Benson lowered the leaflets he was holding and gave all of them to DiGregorio and moved away from the exit.

17. That shortly after Benson gave his leaflets to DiGregorio, Kauzlaric approached Benson, introduced himself and asked Benson for his name, to which request Benson refused stating Kauzlaric was not a police officer, but Benson intimated he would give his name to a police officer, whereupon Kauzlaric and Benson walked over to where defendant Johnson was standing, at which time defendant Kauzlaric introduced himself to defendant Johnson, stating that he was President of the Ceremonial Association and that Benson had refused to identify himself to Kauzlaric as Kauzlaric was not a police officer. Kauzlaric asked Johnson to obtain Benson's name.

18. That defendant Johnson introduced himself to Benson and asked Benson for identification. Benson did not object to identifying himself to Johnson and gave him

[sic] name and address to him. He asked Johnson if it was necessary to give the information Kauzlaric.

19. That Johnson stated that in his opinion the information was public record and that he felt Kauzlaric could obtain the information by asking for it and Johnson then repeated Benson's name and address to Kauzlaric. That Kauzlaric was standing close enough to Benson and Johnson to hear the conversation between them.

20. That during the aforesaid discussion on Friday evening of August 15, 1969, Kauzlaric gave Benson Kauzlaric's business card and stated that if Benson had anything he would like to discuss about the Ceremonial or any other problem that Kauzlaric would like to discuss it with Benson at that time or any other time Benson might desire and it was agreed between Benson and Kauzlaric that Benson would not further distribute the leaflets on the ceremonial grounds.

21. That after the aforesaid discussion, Benson met or was joined by a group of young people who all engaged in a discussion about the leaflet. Benson told the group "That cop took away my leaflets". One of the persons in the group stated that if Benson wanted, the group would tear apart or burn the Ceremonial facility down. Officer Johnson observed this discussion and heard these statements.

22. That Benson departed from the group and ran to the parking lot where he got in Brown's car. As the car started to move from its parking place, Officer Johnson walked by and Michael Benson bent over or crouched down in the car in an attempt to hide from Johnson. Johnson saw Benson trying to hide and stopped the car.

23. That Johnson asked Brown for his driver's license and for the registration papers on the car. After

Brown produced these items the three engaged in a discussion which lasted between five to fifteen minutes. Johnson did not threaten either Benson or Brown with arrest and did not tell them that they had to leave the Ceremonial grounds and believed that Benson had agreed not to further distribute the leaflets on the Ceremonial grounds. Johnson was courteous with the plaintiffs and they were courteous towards Johnson. The conversation included social matters, including the attendance of Mr. Brown and defendant Johnson's daughter at Eastern New Mexico University. The conversation ended on a friendly note and Officer Johnson shook hands with both plaintiffs.

24. That Johnson was specifically authorized by N.M.S.A. §65-3-11 (1953 Comp.) and N.M.S.A. §64-13-49 (1953 Comp.) to obtain Brown's driver's license and automobile registration.

25. That Johnson did not see Brown at any place on the Ceremonial grounds until the conversation which occurred in Brown's car at the parking lot.

26. That the plaintiffs then departed from the Ceremonial grounds.

27. That later that evening Johnson met his grounds supervisor, Sergeant Shockey, and told Shockey that plaintiffs had agreed not to distribute the leaflets on the Ceremonial grounds.

28. That during the forenoon of August 16, 1969, Johnson told Kauzlaric about overhearing the remark about tearing or burning the place down on Friday evening and Benson's rushing off the grounds.

29. That at approximately 12:30 on the following day, Saturday, August 16, 1969, the plaintiffs Benson, Tracy

and Hubbard came to the Ceremonial grounds and started handing out copies of the leaflets.

30. That Kauzlaric, after again observing Benson passing out leaflets on August 16, 1969, discussed with the Assistant District Attorney and District Attorney for McKinley County, who were on the Ceremonial grounds, the contents of the leaflet; the impact the leaflet could have upon the thousands of people, including many of Indian descent, arriving for the afternoon performance; the disturbances at the main entrance to the grandstand by Benson on Friday evening; the remark about tearing or burning the place down as told to Kauzlaric by Johnson; and told the District Attorney and the Assistant District Attorney about his concern that the continued handing out of the leaflet on the Ceremonial grounds might cause a substantial disruption or material interference with the ceremonial activities and sought their advice in their official capacities as District Attorney and Assistant District Attorney for McKinley County, New Mexico, as to what could be done about preventing possible disturbances or disorders.

31. That the Assistant District Attorney interpreted the contents of the leaflet to amount to a call to arms and under the circumstances and the impact which the leaflet could have upon the thousands of people, including many of Indian descent, arriving for the afternoon performance on August 16, 1969, and the events of August 15, 1969, the Assistant District Attorney believed that a substantial disruptive material interference could develop and lead to a riot situation and upon being informed by the District Attorney that the Ceremonial grounds were private property advised Kauzlaric that he, as President of the Association, could withdraw Benson's permission to be on the Ceremonial grounds if he continued to pass out the leaflets and if Benson continued to do so then a criminal complaint could be made by the Association and Benson could be

arrested for criminal trespass. Based upon this advice Kauzlaric informed Johnson that Kauzlaric, as President of the Association, was denying Benson's permission to be on the grounds if he continued to pass out the leaflets.

32. That Johnson stated he must check with his supervisors, contacted his supervisors, Captain Cordova, and received instructions from Cordova to check with the District Attorney and follow his advice.

33. That Johnson located Assistant District Attorney Joseph Rich. Rich told Johnson that Kauzlaric, as President of the Ceremonial Association, had authority to and had withdrawn the consent of the Ceremonial Association for the plaintiff Benson to remain on the Ceremonial grounds handing out the leaflets.

34. That Johnson located Benson and stated that he had been instructed by the District Attorney to tell him to stop handing out the leaflets and that the District Attorney had stated that Benson could be arrested if he continued to hand out the leaflets on the grounds.

35. That Benson asked for an opportunity to discuss the matter with the District Attorney. Johnson took Benson and introduced Rich to Benson as the District Attorney and stated that Benson would like to know what his situation was. Rich advised Benson that the Ceremonial grounds was private property, that permission for him to remain on the premises had been withdrawn, and that if Benson did not stop distributing the leaflets on the premises a criminal complaint in trespass could be filed against him. Benson, following these statements, made no oral reply but manifested his agreement that he would stop passing out leaflets on the Ceremonial grounds.

36. That Rich told Benson he could distribute the leaflets off of the Ceremonial grounds. Johnson asked

Benson if he had any questions or if he understood the situation to which Benson made no reply. Benson and Johnson left the room and Benson joined the plaintiffs Tracy and Hubbard, who were on the Ceremonial grounds handing out leaflets.

37. That Benson told Tracy and Hubbard what the District Attorney had told him and Benson told Tracy and Hubbard that they should leave the grounds to distribute their leaflets.

38. That Officer Johnson told Benson, Tracy and Hubbard they were welcome to remain on the grounds if they would not hand out leaflets or that they could hand out the leaflets outside the grounds to people coming onto the grounds.

39. That Johnson said Benson could inform other persons handing out the leaflets on the grounds of the position taken by the District Attorney and that no one would be arrested until they had been warned to stop handing out the leaflets on the grounds and an opportunity afforded to discuss the matter with the District Attorney if they so desired.

40. That Miss Hubbard was joined by a friend, Kathy Marmon, and started to hand Miss Marmon a leaflet when Officer Johnson lowered his arm to prevent her from handing Miss Marmon the leaflet. Officer Johnson stated "Let's go" and followed behind Tracy, Hubbard, Benson and Marmon at a distance of approximately fifteen feet as they exited from the Ceremonial grounds. Johnson kept a sufficient distance between himself and the plaintiffs so that it would not appear to anyone who saw the plaintiffs leaving the grounds that they were being escorted by a police officer.

41. Officer Johnson's primary responsibility on Saturday afternoon was to guard the funds in the ticket office near the front of the grandstand. Officer Johnson followed the plaintiffs from the Ceremonial grounds to make sure that they left the grounds with the leaflets to avoid his having to try to keep a continual lookout to make sure that they were not handing out the leaflets on the grounds.

42. The defendant Johnson's action on August 16, 1969, was in accordance with Johnson's good faith understanding of his instructions from his supervisor and the District Attorney.

43. That Johnson did not touch any plaintiff at any time material herein other than on two or three occasions when he shook hands with Michael Benson or Eddie Brown nor did Kauzlaric or DiGregorio ever touch any of the plaintiffs at any time material herein.

44. That Officer Johnson was friendly and courteous to the plaintiffs at all times and did not use any abusive language in the presence of the plaintiffs. That all of the plaintiffs were courteous and polite to Officer Johnson and treated him with respect; however, all of the plaintiffs were afraid of Officer Johnson because he was a police officer and not because of anything that he did on Friday the 15th or Saturday the 16th.

45. That Kauzlaric and DiGregorio were friendly and courteous to Benson.

46. That defendant Johnson's conduct in executing what he understood to be the instructions of the District Attorney was reasonable.

47. That defendant Johnson did not arrest the plaintiffs, or any of them, at any time.

48. That defendants, or any of them, did not willfully, knowingly, or purposely deprive plaintiffs or any of them, of any right or privilege secured to them by the Constitution of the United States, or of any right or privilege whatsoever.

49. That the Association through Kauzlaric acting as President of the Association acted under and in reliance upon the advice and counsel of the Assistant District Attorney Rich in Rich's capacity as Assistant District Attorney in withdrawing the Association's permission for Benson to be on the ceremonial grounds and that said acts were done in good faith.

50. That under the facts and circumstances as hereinabove set forth, all of the defendants acted in good faith.

51. That at no time herein did the defendants or any of them threaten or harass the plaintiffs or any of them.

52. That at no time during August 15th or 16th, 1969, and subsequent thereto, did the defendants or any of them act in disregard of or in disdain for plaintiffs' constitutional rights secured to them by the Constitution of the United States or laws thereof by improperly releasing, obtaining, inspiring or encouraging newspaper publicity as a campaign against plaintiffs because of plaintiffs' acts or conduct on or off the Ceremonial grounds on said dates.

53. That the defendants, or any of them, did not individually or otherwise willfully, knowingly, purposely or in concert with others or otherwise, deprive plaintiffs, or any of them, of any rights, privileges or immunities secured to them by the Constitution of the United States or of any right or privilege whatsoever.

54. That there is no evidence of a conspiracy.

55. That each of plaintiffs' claims for monetary damages are conjectural, insubstantial and totally speculative.

56. That the Ceremonial grounds or property owned by the Association is not a public park maintained by the State of New Mexico or any subdivision thereof for the convenience, use, and recreation of the residents of Gallup and the general public, nor held out to be the same.

57. That the Ceremonial grounds is not a public street, way or park dedicated to public use and is not a place open to any person to be used as a public forum.

58. That the purposes to which plaintiffs attempted to use the Ceremonial grounds were inconsistent and contrary to the purposes and uses for which the Ceremonial grounds were dedicated to be used and was not the only place where plaintiffs could have transmitted their message.

59. That plaintiffs, during August 15th and 16th, 1969, passed out the leaflets outside the Ceremonial grounds at the entrances thereto and on the city streets of Gallup without any intervention by any persons.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of the plaintiffs' Amended Complaint.

2. That at all times herein defendant Jack Johnson was acting under color of law in the course and scope of his employment as a New Mexico State Police Officer.

3. That defendant Jack Johnson was specifically authorized by N.M.S.A. §64-3-11, 1953 Comp., and N.M.S.A. §64-13-49, 1953 Comp., to obtain plaintiff Brown's driver's license and automobile registration on Friday, August 15, 1969.

4. After hearing a comment about burning the Ceremonial Association down and having seen Michael Benson run from the Ceremonial grounds and attempt to hide from Officer Johnson, these acts constituted an appropriate circumstance for Officer Johnson to approach Benson and Brown to investigate possible criminal behavior, and Officer Johnson's conduct in stopping the car and requesting identification was, therefore, reasonable conduct by the police officer and was not a violation of any civil right or privilege and immunity guaranteed to the plaintiffs by the Constitution or any statute of the United States.

5. That none of the plaintiffs objected to identifying themselves to Officer Johnson. Johnson's obtaining their identification did not constitute a violation of any civil right or any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

6. That defendant Johnson did not detain plaintiffs Benson or Brown for any unreasonable length of time and any detention for a conversation between the three was consented to by Brown and Benson and as a result of such discussion on August 15, 1969, Johnson did not violate any privilege or immunity guaranteed to plaintiff Benson by the Constitution of the United States or by any statute of the United States.

7. That Officer Johnson acted reasonably under all the circumstances on Friday night, August 15, 1969, and his conduct did not constitute a violation of any privilege or immunity guaranteed to plaintiffs Benson or Brown by the Constitution of the United States or by any statute of the United States.

8. Officer Johnson did not arrest plaintiff Benson or Brown on August 15, 1969, or at any other time.

9. In the event that probable cause should have been necessary for the conduct of Officer Johnson on Friday, August 15 1969, such probable cause existed in his reading of the leaflet, hearing the comment about burning the Ceremonial facility down, observing Benson run from the group, and seeing Benson's attempt to hide from defendant Johnson in plaintiff Brown's car.

10. That defendant Johnson's actions were done in reasonable and good faith performance of his lawful duties as he understood them as a State Police Officer of the State of New Mexico, and, therefore, defendant Johnson is not liable to the plaintiffs for any violation of any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

11. That defendant Johnson was at all times on Saturday, August 16, 1969, acting for or at the express and implied directions of the Assistant District Attorney, a quasi-judicial officer, and with the express and implied direction and orders of his supervisor at the New Mexico State Police, and defendant Johnson is, therefore, immune for any violation of any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

12. That after defendant Association through Kauzlaric, as President of the Ceremonial grounds, being the lawful custodian of the grounds, revoked the Association's permission for Benson to remain on the grounds handing out the leaflets, his continued presence on the grounds handing out the leaflets would have constituted criminal trespass under the laws of the State of New Mexico and Benson could have been prosecuted for criminal trespass.

13. That after defendant Association through Kauzlaric, as President of the Ceremonial grounds, being the

lawful custodian of the grounds, revoked his permission for Benson to remain on the grounds handing out the leaflets his continued presence on the grounds handing out the leaflets would have constituted the misdemeanor of wrongful use of public property and it was the duty of defendant Johnson to attempt to prevent the commission of the misdemeanor which could have resulted in a breach of the peace.

14. That it was the duty of defendant Johnson to execute the express or implied direction of the District Attorney to make sure that the leaflet was not distributed on the Ceremonial grounds on Saturday, August 16, 1969.

15. That if there was any violation of any right, privilege, or immunity secured to Benson by the Constitution or statutes of the United States, then such rights would have been violated by the decision made by the District Attorney, to-wit, that the defendant Kauzlaric had authority to withdraw his consent for Benson to remain on the grounds and hand out leaflets, and that the acts of Officer Johnson in determining that such legal decision was complied with were done in reasonable and good-faith performance of his lawful duties as a State Police Officer, and defendant Jack Johnson is not liable to Benson or the other plaintiffs for any violation of any privilege or immunity guaranteed to plaintiffs by the Constitution of the United States or by any statute of the United States.

16. That if there was any violation of any right, privilege, or immunity secured to Benson by the Constitution or statutes of the United States, then such rights would have been violated by the legal decision made by the District Attorney, to-wit, that the defendant Kauzlaric had authority to withdraw his consent for Benson to remain on the grounds and hand out leaflets, and the acts of de-

fendant Johnson were the result of an honest misunderstanding of his legal duties or an honest mistake of law and fact without realizing that his conduct might result in depriving Benson or the other plaintiffs of any rights or privileges secured to them by the Constitution or statutes of the United States and defendant Jack Johnson is not liable to the plaintiffs.

17. That defendant Johnson did not arrest any of the plaintiffs and, therefore, probable cause is not an element to consider.

18. That none of the plaintiffs were threatened, harassed or intimidated by the defendants, or any of them.

19. That Kauzlaric and DiGregorio did not know nor were they required to know that their actions could conceivably be construed by Benson as depriving Benson of his constitutional rights.

20. That none of the plaintiffs were removed from the Ceremonial grounds by or at the request of the Association, Kauzlaric, DiGregorio or Merry, nor were plaintiffs otherwise threatened or intimidated by the Association, Kauzlaric, DiGregorio or Merry.

21. That the defendants at all times hereto acted lawfully, reasonably and with the good faith belief that their actions were required in order to protect against violation of the public peace and order, and in order to preserve the Ceremonial Association's property.

22. That the Ceremonial grounds is not a public street, way or park dedicated to public use and is not a place open to any person to be used as a public forum.

23. That the purposes to which plaintiffs attempted to use the Ceremonial grounds were inconsistent and contrary to the purposes and uses for which the Ceremonial

grounds are dedicated to be used and plaintiffs did and could have transmitted their message at other places other than the Ceremonial grounds.

24. That the leaflet, and the conduct of the plaintiffs in connection therewith, was calculated to produce disturbance or interference with those in attendance at the Ceremonial.

25. That with thousands of spectators and Indians present and with due regard to the time and manner in which the leaflets were being distributed, and the impact upon those persons attending the Ceremonial activities, including those of Indian descent, the incidents that occurred prior, during and after the August 15, 1969, incident with Benson, Kauzlarie had reason to anticipate that the continued handing out of the leaflets would cause a substantial disruption or material interference with the Association's activities and, with due regard to the obligation of the Association to provide a safe place for the viewing of the Ceremonial, his conduct as President of the Association was required and said conduct and acts were reasonable, performed in good faith and in reliance upon the advice of the Assistant District Attorney.

26 That defendant Association, through its representatives, has the power to preserve the Ceremonial property for the use and purposes for which it was lawfully dedicated. The plaintiffs' acts, conduct, purposes and use of the Association's property was completely contrary to the uses and purposes for which the Association's property was lawfully dedicated by the State of New Mexico and the Association. Plaintiffs' right to use the Ceremonial grounds is a qualified right or privilege and subject to reasonable regulation by officials of the Ceremonial Association and clearly subject to revocation with due regard to the facts and circumstances here involved.

27. That the Association is an agency of the State of New Mexico and is not a person within the contemplation of applicable Federal and Civil Rights statutes, and this action is a suit against a sovereign which has not consented to be sued and the defendants Kauzlaric, DiGregorio and Merry are sued in their official capacities, and this action as to all defendants should be dismissed.

28. No monetary or other damages can be found against the Association.

29. There is no evidence that the Association, Kauzlaric, DiGregorio or Merry acted under color of state law, statute, ordinance or custom to deprive the plaintiffs, or any of them, of their rights, privileges or immunities secured to them by the Constitution of the United States or any statute thereof.

30. Plaintiffs' claims for relief fail to state a claim upon which relief can be granted against any of the defendants, Association, Kauzlaric, DiGregorio, Merry or Johnson.

31. The acts and conduct of the plaintiffs at the times and under the circumstances as they existed, were performed in such manner that they were not constitutionally protected and the acts of the defendants Association, Kauzlaric, DiGregorio and Johnson under such circumstances did not deprive plaintiffs of their constitutionally protected or other civil rights and privileges.

32. That the defendants Merry and DiGregorio did not violate any rights, privileges or immunities secured to plaintiffs Brown, Hubbard or Tracy by the Constitution of the United States or any statute of the United States.

33. That the defendant Merry did not violate any rights, privileges or immunities secured to the plaintiffs

by the Constitution of the United States or any statute of the United States.

34. That if plaintiffs were engaged in constitutionally protected activities or they were deprived of their civil rights, the actions of defendants Association, Kauzlaric, DiGregorio and Johnson were done reasonably and in good faith in the performance of their duties as they understood them in reliance upon the advice of the Assistant District Attorney without any intent whatsoever to deprive plaintiffs of any constitutional rights or other civil rights and privileges, and without the realization that their conduct might result in depriving plaintiffs of such rights and were, therefore, privileged.

35. That there is no actual justiciable controversy here involved.

36. That none of the plaintiffs suffered any compensatory damages as a direct or indirect result of any act or omission of defendants Association, Kauzlaric, DiGregorio, Merry or Johnson.

37. That any damages which plaintiffs may have suffered are conjectural, speculative and insubstantial.

38. That plaintiffs are not entitled to receive punitive damages from any of the defendants.

39. Insofar as injunctive relief is requested, the plaintiffs have not suffered irreparable injury and have a plain, adequate and speedy remedy at law.

40. That on August 15th and 16th, 1969, the acts and conduct of defendants were not a violation of any rights, privileges or immunities secured to plaintiffs Benson, Brown, Hubbard or Tracy by the Constitution of the United States or any statute of the United States.

41. That the plaintiffs at all times were given the same right to and the full and equal benefit of all laws and proceedings for the security of their person and property as are enjoyed by white citizens.

42. That there was no conspiracy among the defendants to deprive plaintiffs, or any of them, either directly or indirectly, nor were any overt acts done by plaintiffs pursuant to a conspiracy to deny plaintiffs of any rights, privileges or immunities under the Constitution and laws of the United States, or the equal protection of the laws or of equal privileges and immunities under the laws of the United States or the State of New Mexico.

43. That the defendants have not violated any of the plaintiffs' rights under 42 U.S.C., Sections 1981, 1983, 1985 (3).

44. That the defendants are not liable to the plaintiffs and judgment will be entered dismissing the complaint, together with the cause.

Dated this 7th day of August, 1970.

Ewing T. Kerr
Judge, United States District Court,
assigned.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. [illegible]

MICHAEL BENSON, JUNE TRACY, EDDIE BROWN and LINDA HUBBARD,
Petitioners;

vs.

JOSEPH RICH, JACK JOHNSON, CHRIS DiGREGORIO, EDWARD S. ("IKE") MERRY, and RICHARD KAUZLARIC,
Respondents.

BRIEF OF RESPONDENT JOSEPH RICH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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BRIEF OF RESPONDENT JOSEPH RICH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Is an Assistant District Attorney immune from civil liability for alleged damages resulting from his interpretation of state law, his application of the same to the facts submitted to him, and his resulting advice to a state officer given at the latter's request?

(2) Did the legal advice given a state officer by the Assistant District Attorney deprive Petitioners of rights secured them by the United States Constitution?

STATUTES INVOLVED

In addition to those set forth in the petition at pages 2 and 3:

> Section 17-1-11, New Mexico Statutes Annotated, 1953:
> "Each district attorney shall:
> A. Prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested;
> * * *
> C. Advise all county and state officers whenever requested;
> * * *"

Section 40A-14-1, New Mexico Statutes Annotated, 1953:

> "Criminal trespass consists of unlawfully, and with malicious intent, entering or remaining upon the lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof.
>
> Whoever commits criminal trespass is guilty of a petty misdemeanor."

Section 40A-14-5, New Mexico Statutes Annotated, 1953:

"A. Wrongful use of public property consists of:

* * *

(2) remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use or that the public property may be damaged or destroyed by the use; or

(3) depriving the general public of the intended or customary use of public property without a permit.

* * *

E. As used in this section, 'public property' means any public building, facility, structure or enclosure used for a public purpose or as a place of public gathering, owned or under the control of the state or one of its political subdivisions or a religious, charitable, educational or recreational association.

F. Any person who commits wrongful use of public property is guilty of a petty misdemeanor.

G. Any person who commits wrongful use of public property after having been requested to leave by the lawful custodian or his representative or any peace officer, who has jurisdiction, is guilty of a misdemeanor."

STATEMENT OF THE CASE

This lawsuit arises out of events and occurrences that took place at the 1969 Gallup Indian Ceremonial in Gallup, New Mexico, on Friday, August 15 and Saturday, August 16. The trial judge made 18 findings of fact in granting Rich's summary judgment motion. (Petition pp. 17-20) and then made 59 findings of fact at the conclusion of a four day trial on the merits against the remaining Respondents. (Petition pp. 24-36). In their appeal to the Tenth Circuit Court of Appeals, Petitioners did not attack any of the fact findings made by the trial court as being unsupported by the evidence.

The Respondent, Joseph L. Rich, is, and was at all material times, the Assistant District Attorney for McKinley County, New Mexico, the county in which the Indian Ceremonial was held. His only involvement with this case occurred on Saturday (App. 11, 347), and, since Friday's events are adequately explained in the brief filed herein by Respondents DiGregorio, Merry, and Kauzlaric, we will not repeat them here.

Rich was at the Ceremonial grounds on Saturday as a member of a voluntary committee assisting with the Ceremonial. While there, he was handed a copy of the leaflet in question (App. 369) and was told that there had been a disturbance at the main entrance and exit to the grandstand on Friday night by a person passing out the leaflets and blocking the area. (App. 349, 350). Rich read the leaflet and came to the conclusion that its language presented a clear and imminent danger of creating or inciting a riot situation among the approximately 8,000 persons who were expected to attend each performance at the Ceremonial that day. (App. 350, 351, 353, 360).

Mr. Kauzlaric, the President of the Ceremonial Association (a state agency) approached Rich, indicated that he was concerned about another disturbance occurring and asked Rich what might be done to prevent the occurrence of such a disturbance. (App. 339, 341, 342, 343, 350, 351, 353). Rich felt that he was being approached by Kauzlaric in his capacity as Assistant District Attorney, that his advice was being solicited in that capacity, and that he gave such advice in that capacity. (App. 361, 362, 363). Rich's principal concern was to prevent a riot situation from developing. (App. 363). It is interesting to note that DiGregorio, who was present at the Friday night disturbance, had concluded that the leaflet was designed to create a disturbance or to incite a riot (App. 317), and that Officer Johnson, a state police officer trained in riot and crowd control, felt that a potential riot or trouble situation existed. (App. 329-335).

Rich asked Kauzlaric whether the Association owned the grounds and, upon being told that it did, advised Kauzlaric that, as President of the Association, he could withdraw his consent for the person handing out the leaflets to remain on the premises. (App. 353, 339). It was the judgment of the Assistant District Attorney that the New Mexico trespass statutes (Sec. 40A-14-1 and Sec. 40A-14-5, N.M.S.A., 1953) were applicable and, if consent to remain was withdrawn but Petitioners refused to leave, a criminal complaint could be filed. (App. 363, 358).

Kauzlaric then told Officer Johnson that he was withdrawing the Association's consent or permission for Benson (who was the only person Kauzlaric knew to be distributing the leaflets) to remain on the grounds, and asked Johnson to ask Benson to leave. (App. 339, 340, 323, 324, 337). Johnson passed this information along to Benson

who said he wanted to talk to Rich. (App. 323, 324). Johnson then accompanied Benson to the room where Rich was located, introduced Rich to Benson as the District Attorney or Assistant District Attorney and requested Rich to advise Benson as to what his situation was. (App. 354, 355).

Although there is some dispute as to exactly what Rich said, the evidence, even taken in a light most favorable to Petitioners, is that Rich told Benson that the Ceremonial officials did not like what he was doing with passing out the leaflets, that the Ceremonial grounds were private property, that permission for him to remain on the premises had been withdrawn, and that he would be arrested if he did not leave the premises or stop passing out the leaflets. (App. 309; cf. App. 358, 359, 324, 325, 341). Rich explained to Benson that the leaflets could be distributed in the streets. (App. 310). Benson made no reply and he and Johnson left the office. (App. 358). This was the only contact the Assistant District Attorney had with Benson and he did not even know the other Petitioners were involved with Benson much less did he have any contact with them. Johnson then accompanied Benson and his companions off the Ceremonial grounds. (App. 326-329). At no time were any of the Petitioners arrested.

Based upon the above facts, the trial court held that the Assistant District Attorney was immune from liability, made findings and conclusions explanatory of his decision and entered summary judgment in Rich's favor. This judgment was affirmed by the United States Court of Appeals for the Tenth Circuit.

REASONS FOR DENIAL OF THE WRIT

I

The Decision Below in No Way Conflicts with Other Courts of Appeals on the Issue of Immunity.

Although summary judgment was granted Rich on the theory of judicial or quasi-judicial immunity, the Tenth Circuit affirmed on the constitutional issue and did not reach the immunity question. Indeed, nowhere does the term "immunity" appear in the Tenth Circuit's decision. Its decision cannot, therefore, be said to be in conflict with other Courts of Appeals on the issue of immunity.

Even if the Tenth Circuit had reached and totally adopted the trial court's reasoning on the issue of immunity, there would still exist no reason for the issuance of the writ sought herein because there is no true conflict among the circuits on the question of the prosecuting attorney's immunity. Neither the decision by the trial court nor any of the other cases cited by Petitioners hold that a District Attorney has a "blanket immunity" solely by virtue of the position he holds and without regard to the kind of conduct involved in the particular case. All courts agree that there are limitations on the District Attorney's immunity. See *Bradley* v. *Fisher*, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646 (1872); *Yaselli* v. *Goff*, 2d Cir., 12 F.2d 396 (1926), aff'd *per curiam* 275 U.S. 503.

As Judge Learned Hand noted in *Gregoire* v. *Biddle*, 2d Cir., 177 F.2d 579 at 581 (1949):

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers. . . ."

Accord: *Barr* v. *Matteo*, 360 U.S. 564, 572 (1959); *Bauers* v. *Heisel*, 3rd Cir., 361 F.2d 581 (1966); *Kostal* v. *Stoner*, 10th Cir., 292 F.2d 492 (1961); *Kenney* v. *Killian*, D.C.W.D. Mich., 133 F.Supp. 571 (1955), aff'd *Kenney* v. *Fox*, 6th Cir., 232 F.2d 288 (1956); *Jennings* v. *Nestor*, 7th Cir., 217 F.2d 153 (1954); *Norton* v. *McShane*, 5th Cir., 332 F.2d 855 (1964).

The difference, if any, between the courts exists in phrasing the limitations. This does not create any true conflict between the Circuits. Furthermore, regardless of the manner in which the limitations on the District Attorney's immunity are phrased, there is no conflict in applying those limitations to the facts. The acts allegedly committed by the prosecuting attorneys in *Robichaud* v. *Ronan*, 9th Cir., 351 F.2d 533 (1965) and *Lewis* v. *Brautigam*, 5th Cir., 227 F.2d 124 (1955) would have resulted in a denial of the defense of immunity whether the cases were decided by the Tenth Circuit or by any other circuit wherein Petitioners contend a conflict as to the scope of immunity exists.

The trial court held that the Assistant District Attorney was entitled to immunity because, at all material times, he was acting in his judicial or quasi-judicial capacity in the performance of his duties concerning matters within his jurisdiction. (Petition App. A. page 21). At the request of a state officer, Rich interpreted New Mexico law, applied the same to the facts submitted to him, and advised the officer as to what might be done to prevent a riot situation from developing. Under Section 17-1-11(c), N.M.S.A., 1953, Rich had a mandatory duty to "advise all state officers whenever requested" and it was his fulfillment of such duty which gave rise to the claim against him. The District Attorney also had a statutory duty to prosecute all criminal cases in which the state may be a party or may be interested. Section 17-1-11(a), N.M.S.A., 1953. Cer-

tainly his duties are not limited to situations where a criminal offense has already been committed, and if he has an opportunity to prevent a situation of possible violence from developing, it would appear that he would be derelict in his duties if he failed to do so. Rich's decision that Benson's activities had or would violate state law is similar to the decision which precedes the presentation of a case to the grand jury or the approval of a criminal complaint being filed. Can it be seriously argued that Rich was not acting in the performance of his official duties or that his legal advice had no connection with the general matters committed to his authority and jurisdiction?

The thrust of Petitioners' case against Rich was that his decision and his legal advice were erroneous. Even if it were, which we do not at all concede, this does not mean that Rich was acting outside the performance of his duties or that his immunity had been removed. *Kenney* v. *Killian*, D.C.W.D. Mich., 133 F.Supp. 571 (1955), aff'd *Kenney* v. *Fox*, 6th Cir., 232 F.2d 288 (1956). See *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682 (1949); *Lewis* v. *Brautigam*, *supra*.

In the present case there was no arrest. However, even if Petitioners had refused to leave the Ceremonial grounds and had, in fact, been arrested and prosecuted and either acquitted in a trial on the merits or their case dismissed by the court, it is clear that the District Attorney would be immune from liability. *Yaselli* v. *Goff*, *supra*. *Bauers* v. *Heisel*, *supra*. *Cawley* v. *Warren*, 7th Cir., 216 F.2d 74 (1954). We submit that a District Attorney should not be liable for advice not even resulting in an arrest.

II

The Decision Below Did Not Decide an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

As noted above, the Tenth Circuit did not decide any issue relative to the immunity of a prosecuting attorney.

Moreover, the existence and scope of judicial and quasi-judicial immunity under Section 1983 of the Civil Rights Act was decided by this Court in *Pierson* v. *Ray*, 386 U.S. 547 (1967). Although the case only dealt specifically with the immunity of a police justice, this Court held previously in *Yaselli* v. *Goff*, *supra*, that a prosecuting attorney has the same immunity as a judge. In footnote nine, this Court in *Pierson* cited *Bauers* v. *Heisel*, 3rd Cir., 361 F.2d 581 (1966), as an example of the consistent holdings that "judicial immunity" is a defense to an action under Section 1983. The *Bauers* case, *supra*, dealt with the immunity of a county prosecutor. See also, *Cawley* v. *Warren*, 7th Cir., 216 F.2d 74 (1954); *Kenney* v. *Fox*, 6th Cir., 232 F.2d 288 (1956); *Kostal* v. *Stoner*, 10th Cir., 292 F.2d 492 (1961).

III

The Decision Below Is Not in Conflict with Monroe v. Pape.

Petitioners contend that the decision below is somehow in conflict, on the issue of immunity, with this Court's holding in *Monroe* v. *Pape*, 365 U.S. 167 (1961). The same argument was apparently made in *Pierson* v. *Ray*, *supra*, and the Court's answer is equally dispositive here:

> "*Monroe* v. *Pape* presented no question of immunity, however, and none was decided."

386 U.S. at 556. See e.g. *Rhodes* v. *Houston*, D.C. Neb., 202 F.Supp. 624 (1962), aff'd 8th Cir., 309 F.2d 959, cert. den. 377 U.S. 909.

IV

The Decision by the Court of Appeals Does Not Conflict with Recent Decisions of This Court Concerning Free Exercise of Expression.

In the first place, the decision by the Tenth Circuit was based upon the special and unique fact circumstances surrounding the events which occurred at the Gallup Indian Ceremonial on Friday and Saturday, the atmosphere at those times and places, and the language of the particular leaflet in question. All applicable constitutional principles were observed. Petitioners simply disagree with the facts and feel that the courts below erred. It is not the proper function of certiorari to correct these matters. See address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 Sup. Ct. V, VI. In their appeal to the Tenth Circuit, the Petitioners did not choose to attack the sufficiency of the evidence to sustain any fact findings made by the trial court. See 448 F.2d at 1374. Although we recognize that there are special circumstances where this Court will examine the facts, we question whether that rule should apply here.

Ignoring all of the other facts detailed by the Tenth Circuit in its opinion, Petitioners contend that the holding against them was premised only upon two facts and then proceed to attack those facts. The decision below was not grounded solely upon the finding that the leaflet in question was a "call to arms" and it was necessary that its distribution be halted to prevent possible disorders or riots, or upon the remark about tearing apart or burning down the facilities. As mentioned above, the decision was based upon a broad combination of facts and circumstances.

Leafletting and other similar activities may be constitutionally regulated or prevented where it is disruptive of the use to which the public has dedicated the property in question or it interferes with the rights of other members of the public to the normal use of the property. *Adderly v. State of Florida*, 385 U.S. 39 (1966); *Amalgamated Food Employees Union Local 590 v. Logan Valley, Inc.*, 391 U.S. 308 (1968); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Huxley v. Hinckley*, D.C. Mass., 304 F.Supp. 704 (1969), aff'd 396 U.S. 277 (1970). That is what the Court found existed here. Rich had been advised by the President of the Ceremonial that Petitioners' conduct had already disrupted the use of the property for such purposes and interfered with the rights of other members of the public to enjoy the normal use of the property, and that the President was concerned that a repetition of such conduct could result in even more serious consequences. The Assistant District Attorney was not required to conduct his own independent evidentiary investigation before advising the President of the state agency as to the applicability of local criminal statutes and as to what might be done to prevent further disorder and, perhaps, violence. He was entitled to rely upon the facts submitted to him. *Pearson v. Reed*, 6 Cal. App.2d 277, 44 P.2d 592 (1935).

The situation presented to Rich for his on-the-spot decision and advice was similar to that presented to the college authorities in *Norton v. Discipline Committee of East Tennessee State University*, 6th Cir., 419 F.2d 195, cert. den. 399 U.S. 906 (1970). Those in charge of the situation need not wait until violence has actually occurred before acting. As the court below said in the instant case:

> ". . . those in charge could take reasonable and good faith action to prevent a disastrous situation which they had reason to believe could occur."

448 F.2d at 1374.

The court's decision below does not conflict with *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Cohen* v. *California*, 403 U.S. 15 (1971) or *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). In those cases, unlike ours, there was no violence, disruption or disturbance, nor was there any reasonable expectation of violence or disturbances.

The Court in *Bachellar* v. *Maryland*, 397 U.S. 564 (1970), pointed out that the disorderly conduct convictions involved therein would have been sustained if they had been based upon findings that those involved blocked the sidewalks and refused to get up and move after being ordered to do so by the police. The infirmity with the convictions was the fact that, under the instructions to the jury, the defendants could have been convicted solely upon the ground that they were advocating unpopular ideas. As the Court said in the present case at page 1374:

> "The action of the public officials was not directed toward the dissemination of ideas or opinions; but solely to maintain peace and order on the ceremonial grounds and the prevention of violence and a riotous situation."

Nor does the decision below conflict with *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). That case was reversed solely upon the ground that the temporary restraining order prohibiting a white supremist and racist organization from holding a rally was acquired *ex parte*, without notice to the petitioners, and without any effort, however informal, to invite or permit their participation in the proceedings.

CONCLUSION

The Respondent, Joseph L. Rich, respectfully submits that there are no special or important reasons for granting the writ of certiorari and for that and the foregoing reasons respectfully requests that the Petition for a writ of certiorari be denied.

Respectfully submitted,

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